THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977: A 30TH ANNIVERSARY REVIEW

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

Wednesday, July 25, 2007

Serial No. 110-36

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
or
Committee address: http://resourcescommittee.house.gov

U.S. GOVERNMENT PRINTING OFFICE

37-013 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON NATURAL RESOURCES

NICK J. RAHALL II, West Virginia, *Chairman*
DON YOUNG, Alaska, *Ranking Republican Member*

Dale E. Kildee, Michigan
Eni F.H. Faleomavaega, American Samoa
Neil Abercrombie, Hawaii
Solomon P. Ortiz, Texas
Frank Pallone, Jr., New Jersey
Donna M. Christensen, Virgin Islands
Grace F. Napolitano, California
Rush D. Holt, New Jersey
Raúl M. Grijalva, Arizona
Madeleine Z. Bordallo, Guam
Jim Costa, California
Dan Boren, Oklahoma
John P. Sarbanes, Maryland
George Miller, California
Edward J. Markey, Massachusetts
Peter A. DeFazio, Oregon
Maurice D. Hinchey, New York
Patrick J. Kennedy, Rhode Island
Ron Kind, Wisconsin
Lois Capps, California
Jay Inslee, Washington
Mark Udall, Colorado
Joe Baca, California
Hilda L. Solis, California
Stephanie Herseth Sandlin, South Dakota
Heath Shuler, North Carolina

Jim Saxton, New Jersey
Elton Gallegly, California
John J. Duncan, Jr., Tennessee
Wayne T. Gilchrest, Maryland
Chris Cannon, Utah
Thomas G. Tancredo, Colorado
Jeff Flake, Arizona
Stevan Pearce, New Mexico
Henry E. Brown, Jr., South Carolina
Luis G. Fortuño, Puerto Rico
Cathy McMorris Rodgers, Washington
Bobby Jindal, Louisiana
Louie Gohmert, Texas
Tom Cole, Oklahoma
Rob Bishop, Utah
Bill Shuster, Pennsylvania
Dean Heller, Nevada
Bill Sali, Idaho
Doug Lamborn, Colorado
Mary Fallin, Oklahoma
Kevin McCarthy, California

James H. Zoia, *Chief of Staff*
Jeffrey P. Petrich, *Chief Counsel*
Lloyd Jones, *Republican Staff Director*
Lisa Pittman, *Republican Chief Counsel*

CONTENTS

OVERSIGHT HEARING ON "THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977: A 30TH ANNIVERSARY REVIEW"

Wednesday, July 25, 2007
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to call, at 10:01 a.m. in Room 1324, Longworth House Office Building, Hon. Nick Rahall, II, [Chairman of the Committee] presiding.

Present: Representatives Rahall, Holt, Grijalva, Bordallo, Sarbanes, Kind, Inslee, Baca, Shuler, Duncan, Pearce, Shuster, Heller, Sali, and Lamborn.

STATEMENT OF THE HONORABLE NICK J. RAHALL, II, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

The CHAIRMAN. The full Committee on Natural Resources will come to order.

Before the Chair proceeds this morning, I know we are celebrating an anniversary, but there is one other celebration I would like to note, and it has to do with age, as well. And that is the birthday of one individual sitting to my immediate left, who has been with me for, well, he doesn't like me to say ages any more, not only how long he has been with me nor his actual age, because he wants all the certain individuals in the crowd to know that he is single once again, so I won't mention any ages.

But I do want to wish my Chief of Staff on the Committee, and long-time confidante, and a man for whom I deeply appreciate his loyalty and dedication and work on behalf of the people of West Virginia, and serving me for over 27 years, Jim Zoia. Happy Birthday, Jim.

[Applause.]

The CHAIRMAN. I didn't want to ruin his day by singing.

[Laughter.]

The CHAIRMAN. OK. The Committee is meeting today to conduct an oversight hearing on the implementation of the Surface Mining Control and Reclamation Act of 1977, as we approach the 30th anniversary of its enactment on August 3.

I have had a long relationship with this law, having served on this committee and on the Conference Committee on H.R. 2 as a

freshman Member of this body back in 1977, for the legislation that was enacted as SMCRA. Today, 30 years later, of those Members of the House of Representatives who signed that conference report, I am the only one still in office. Senator Pete Domenici remains as the only Senator who signed the conference report still in office.

I recall very well standing on that hot day in the Rose Garden of the White House with coal field activists, representatives of the coal industry, and elected officials, when President Jimmy Carter signed H.R. 2 into law. After years of struggle, highlighted by the disaster that took place in 1972 at Buffalo Creek in Logan County, West Virginia, and two Presidential vetoes, the Nation finally had a surface mining control and reclamation law.

As with most laws, this law was a compromise. President Carter pointed out and expressed some misgivings in his remarks on that hot August day. But at the same time, Chairman Mo Udall noted, and I quote, "And by getting this bill passed today, we are showing this nation loves its land and respects it, and is going to protect the land, while at the same time we increase the production of coal."

On a personal note, I am indeed honored to hold this hearing today as Chairman of the Committee that Mo Udall once chaired, as I look up and gaze at his portrait, in a room named after him, and with his son, Mark Udall, as a member of this committee.

Just as it was a struggle to get SMCRA enacted into law, it has been a 30-year struggle to implement and properly enforce it. The rapid progress made during the very early years by the first Director of the Office of Surface Mining Enforcement, Walter Hines, and his staff, was squashed with the advent of the Reagan Administration under the banner of regulatory relief. I am not so certain the agency ever fully recovered.

While I salute the many hardworking employees at the Office of Surface Mining Reclamation and Enforcement, on too many occasions the agency has been a rudderless ship lacking strong leadership. This morning, for instance, its director will not present testimony before this committee, because the agency lacks one. My sense is that the agency is once again adrift, floating in a sea of coal-field citizen unrest and industry desire to have regulatory stability.

It was the intention of SMCRA to dovetail the needs of the environment and the need for coal production. Today, regrettably, I believe that goal remains elusive.

While there are successes, primarily in the area of reclaiming abandoned coal mines, much remains wanting. The rise of mountaintop-removal coal mining during the late 1990s was directly related to the enactment of stronger Federal Clean Air Act legislation, which placed an even greater premium on low-sulfur coal reserves, such as in my district in southern West Virginia, eastern Kentucky, and southwestern Virginia.

SMCRA explicitly allows this type of mining to take place by giving it an exemption from the overall requirement that mine lands be returned to their approximate original contour, provided—and I stress provided—that post-mining land use be implemented that gives rise to developments which help the people and sustain the

coalfield economy, be it industrial, commercial, residential, or agricultural.

And I recall very well that spring of 1977, my first year in this body, when at my invitation then-Chairman Mo Udall visited mine sites in southern West Virginia. And he agreed that with flatland at such a premium, that we should not totally abolish the practice of mountaintop mining; but that we should have an exemption, an exemption that would allow for better post-mining uses of that land.

The question today is whether this is truly taking place; whether it is the rule, or whether it is the exception.

There is no doubt in my mind that the enforcement of the Surface Mining Control and Reclamation Act has and continues to be an issue in virtually all areas, including blasting and control of acid-mine drainage; the disposal of coal combustion waste into mines; the conflicts in the western states between surface coal mining and other land uses; and certainly, there are water quality issues.

I am well aware of the concerns and criticisms of those coalfield residents whose homes and way of life are being disrupted by surface coal mining operations. And I am equally aware of the pressing need for the production of coal, for the jobs, for the contribution to the coalfield economies. And I am also aware of the need for regulatory stability, so that all interested parties know what is expected.

Earlier I noted that SMCRA's goal of dovetailing the interests of the environment and coal production remains elusive, but it must not remain so. We can do better. Those of us here gathered today in this room and those watching this proceeding on the Internet, working together can make that goal a reality.

Today this committee will hear from a well-represented list of people who have a stake in the Surface Mining Control and Reclamation Act. I have endeavored to have each panel—representatives from the states, citizen groups, and the industry—reflect the geographical areas of mining in this country. As well, I am particularly honored and pleased that coal labor is represented with us today, in the presence of its International President of the United Mine Workers Union, Cecil Roberts.

This will be a lengthy hearing, and the subject matter is deserving of it. I would remind the witnesses as I conclude to limit their oral presentations to five minutes so that we have ample time for further discussion and interaction during the questioning period.

With that, I recognize the Ranking Member, Mr. Pearce of New Mexico.

STATEMENT OF THE HONORABLE STEVE PEARCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Mr. PEARCE. Thank you, Chairman. I know that the Surface Mining Act has been very important in West Virginia; it has also been very important in New Mexico. Coal has been mined in New Mexico since the time of Spanish settlement.

In the 1860s the Army and railroads further developed the resource. However, significant development of New Mexico's coal-

fields did not occur until after the enactment of the Surface Mining Act passed in 1977.

Coal resources underlie 12 percent of New Mexico. Most of these resources lie under Indian tribal lands in northern New Mexico. In 2004, 1,697 people were employed at seven coal mines, with an annual production value of more than $650 million. That coal is used to generate electricity for fellow New Mexicans and our neighbors in Arizona.

Nationally, coal provides 52 percent of our electricity, energy, and specifically energy produced from coal is the fuel that drives this nation's economic engine, currently the most robust in the world. This electricity is used to heat and cool our homes, run our computers, cook our dinners, communicate with one another, keep abreast of local and world events, and provide a healthy living environment.

Nevertheless, fear of human-caused climate change has led many to call for radical reductions in coal consumption and other fossil fuels until we can successfully sequester the CO_2 that is released by burning these resources.

In May the Energy and Parks Subcommittees held a joint oversight hearing entitled, "The Future of Fossil Fuels, Geological and Terrestrial Sequestration of Carbon Dioxide." At that hearing witnesses testified that the technology to sequester CO_2 was not ready for commercial use, and would not be ready for years into the future, even with sequestration study programs such as the one in the Chairman's H.R. 2337.

We also heard testimony that sequestering the CO_2 would add as much as 25 percent to the cost of energy produced from coal-fired power plants, if not more. In today's Wall Street Journal there is an article which points out the increase in cost. A hearing judge of the Minnesota Public Utilities Commission concluded it would cost $472 million in 2011 dollars to make the power plant that is proposed capable of capturing about 30 percent of its carbon dioxide emissions, and it would cost another $635 million to build a pipeline to move the greenhouse gas to the nearest deep geologic storage in Alberta, Canada.

Thus, $1.1 billion in additional costs for that power plant, adding $50 per megawatt hour, making that energy twice as costly as energy from other plants.

We see in that same article that 150 new coal generating plants were contemplated as late as May of this year, but now plans for many of those are being pulled off of the shelves because of the increased cost, and because of the discussions that we are having here.

I fear for the future of coal, based on the discussions that we are having in Washington today. I fear that if we act on climate-change legislation before the sequestration technology has become economic, well-meaning but misguided individuals will force our nation to dramatically reduce its coal consumption. This will force mines to close, cost jobs, cause rural mining communities to face high unemployment, major tax and royalty revenue loss, and force electricity prices to skyrocket for Americans and American businesses.

These policies, the Surface Mining Act, and climate change legislation, caps and trade on carbon or carbon taxes are directly linked. To look at them in a separate vacuum would be misleading.

For example, if we reduce our use of coal and do not use this abundant natural resource, where and who will pay the abandoned mine land fee that is used to clean up the many abandoned coal mines that had operated prior to the enactment of a SMCRA in 1977?

In New Mexico, more than $8 million has been spent from monies collected from coal operations to clean up and secure high-priority abandoned mine land reclamation projects, since the program was approved in 1981.

I thank the witnesses for their time and testimony, and look forward to hearing from you all. Thank you, Mr. Chairman, for this hearing.

The CHAIRMAN. Thank you, Mr. Pearce. Before I recognize, do other members wish to make statements?

Mr. Duncan of Tennessee.

STATEMENT OF THE HONORABLE JOHN J. DUNCAN, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. DUNCAN. Well, thank you very much, Mr. Chairman, and thank you for calling this hearing. This is a very important topic, and I am sure that a lot of good things have come out of this law. But I am glad that you are holding this hearing, because I am not going to be able to stay for very much longer because of so many other things on my schedule.

But I did want to come here to express my concerns about what I believe was an unintended consequence, maybe unintended, at least on the part of some people. And that is, I was told a few years ago that in 1978 there were 157 small coal companies in east Tennessee, and now there are none. And the coal production in east Tennessee, or in the whole State of Tennessee, is a fourth of what it was, and has been at that level for many years.

And maybe not all of those companies should have been in existence, but I also know that what happened, we opened up an Office of Surface Mining in Knoxville at that time. And it is much easier for a Federal bureaucrat to deal with one large company instead of 100 little ones. But I think it is kind of sad that so many small businesses went out of business because of the activities of that office, and really regulatory overkill, based on the people I think taking, some regulators taking this law further than what I am sure some of the authors intended.

And just to show you, a few years ago I saw a sad sight that I never thought I would see. I came back from lunch at a restaurant in Knoxville, and I saw 125 miners demonstrating in front of the Office of Surface Mining there in Knoxville with signs saying please let us work, please let us mine. And I thought, you know, that is a sad sight to see Americans who want to work, but their government is not allowing them to do so. And what was the saddest part was that some of the Federal regulators there at that time were looking out of their windows in this old hotel which had been converted into an office building, laughing at these poor,

unemployed miners. And so a lot of people lost their small businesses, and a lot of people lost employment in my area.

And so I hope that as we look at these laws in the future, that we will keep the poor and the lower income and the working people in mind. Because you have to have balance and common sense in these things. If you go too far in one direction, you destroy jobs and you drive up prices. And it helps the big giants in these industries, but it sure hurts the little guy.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, gentlemen. Before recognizing the panel, I do want to note the presence in the room of another individual that was behind President Jimmy Carter, besides myself, 30 years ago on that hot August day in 1977. And that is Louise Dunlap, who is standing in the back of the room here, and who was noted by President Jimmy Carter in his comments when he signed the law, I might add, when he said, and I quote, "I think all of you know that Louise Dunlap has in the last six years organized and worked and been persistent in the face of diversity and disappointment." Welcome, Louise.

Let us proceed with the panel.

Mr. PEARCE. Mr. Chairman, if I may.

The CHAIRMAN. Oh, I am sorry. The gentleman from New Mexico.

Mr. PEARCE. Yes. I would make a unanimous consent request to enter into the text of today's hearing the Wall Street Journal article that I referred to.

The CHAIRMAN. Without objection, so ordered.

[The Wall Street Journal article follows:]

Coal's Doubters Block New Wave of Power Plants
By REBECCA SMITH
July 25, 2007

From coast to coast, plans for a new generation of coal-fired power plants are falling by the wayside as states conclude that conventional coal plants are too dirty to build and the cost of cleaner plants is too high.

If significant numbers of new coal plants don't get built in the U.S. in coming years, it will put pressure on officials to clear the path for other power sources, including nuclear power, or trim the nation's electricity demand, which is expected to grow 1.8% this year. In a time of rising energy costs, officials also worry about the long-term consequences of their decisions, including higher prices or the potential for shortages.

Our Generation

U.S. 2005 energy consumption, by source; billions of kilowatt-hours

Coal	2,013.2
Nuclear	782.0
Natural Gas	757.9
Hydro electric and other renewables	357.9
Other	143.6
Total	4,054.7

LUMPS FOR COAL

- Dwindling Fleet: A new generation of power plants is stalling due to concerns over their fuel: coal.
- Cheap and Dirty: Coal is plentiful in the U.S. but is a major source of emissions that contribute to global warming.
- The Long Term: Blocked plants could prompt power officials to try to quell consumption or advance other sources.

As recently as May, U.S. power companies had announced intentions to build as many as 150 new generating plants fueled by coal, which currently supplies about half the nation's electricity. One reason for the surge of interest in coal was concern over the higher price of natural gas, which has driven up electricity prices in many places. Coal appeared capable of softening the impact since the U.S. has deep coal reserves and prices are low.

But as plans for this fleet of new coal-powered plants move forward, an increasing number are being canceled or development slowed. Coal plants have come under fire because coal is a big source of carbon dioxide, the main gas blamed for global warming, in a time when climate change has become a hot-button political issue.

An early sign of the changing momentum was contained in the $32 billion private-equity deal earlier this year to buy TXU Corp. To gain support for the deal, the buyers decided to trim eight of 11 coal plants TXU had proposed in Texas. Recent reversals in Florida, North Carolina, Oregon and other states have shown coal's future prospects are dimming. Nearly two dozen coal projects have been canceled since early 2006, according to the National Energy Technology Laboratory in Pittsburgh, a division of the Department of Energy.

It's hard to say how many proposed plants will never be built. Some projects suffer public deaths when permits are denied. Many more simply wither away, lost in the multiyear process of obtaining permits, fending off court challenges and garnering financing.

In the wake of the fading coal proposals, and others that are expected to follow, Citigroup downgraded the stocks of coal-mining companies last week, noting that "prophesies of a new wave of coal-fired generation have vaporized." On Monday, Steve Leer, chief executive of Arch Coal Inc., said some of the power plants he had expected to be built "may get stalled due to the uncertainty over climate concerns."

For now, coal companies haven't taken steps to ratchet back production or big projects because of coal-plant delays. They believe that in a time of global energy concerns, U.S. coal supplies will be seen as too important to dismiss. The U.S. has the world's largest coal reserves and is sometimes called "the Saudi Arabia of coal" by energy-industry observers.

"It would be quite foolish and quite unthinkable not to have coal play an important role," says investor Wilbur Ross, who has increased his coal holdings and is nonexecutive chairman of International Coal Group Inc. He predicts cleaner-coal technology will improve enough to become viable.

Roadblocks for coal put greater attention on other sources. The U.S. power industry is exploring building more nuclear power plants. But those plans are several years away, and nuclear power currently provides only about a fifth of U.S. needs. Other sources, like wind, don't provide around-the-clock energy, while solar is relatively expensive and isn't yet capable of producing large amounts of electricity.

That puts the focus on natural gas. "Gas is the bridge fuel" that will step in if coal stumbles, says Marc Spitzer, a member of the Federal Energy Regulatory Commission, regulator of the nation's wholesale gas and electricity markets.

Currently, clean-burning gas provides roughly a fifth of the nation's power needs. But the nation's gas production has been flat, and other industries are increasingly using it as a fuel or raw material. Mr. Spitzer says that the nation needs more facilities to accept liquefied natural gas, which is gas cooled into a liquid that can be imported from overseas.

The rapid shift away from coal shows how quickly and powerfully environmental concerns, and the costs associated with eradicating them, have changed matters for the power industry. One place where sentiment has swung sharply against coal is Florida. Climate change is getting more attention there because the mean elevation is only 100 feet above sea level, so melting ice caps would eat away at both its Atlantic and Gulf of Mexico coasts.

In mid-July, Florida Gov. Charlie Crist convened a climate-change summit to explore ways the state could improve its environmental profile. In June, he signed into law a bill that authorizes the Florida Public Service Commission to give priority to renewable energy and conservation programs before approving construction of conventional coal-fired power plants.

The law was bolstered by a recent report from the nonprofit American Council for an Energy Efficient Economy that found Florida could reduce its need for electricity from conventional sources, like gas and coal, by 29% within 15 years if it implemented aggressive energy efficiency measures.

On the eve of the governor's summit, backers of a major power-plant proposal said they would suspend development activities for an 800-megawatt coal-fired plant proposed by four city-owned utilities including the one serving the state capital, Tallahassee. (One megawatt can power 500 to 1,000 homes.) The backers cited environmental issues.

That decision followed the rejection by the utility commission of a proposal by Florida Power & Light Co., a unit of FPL Group Inc., to build a 1,960-megawatt coal plant in Glades County, Fla. The commission found that the plant was cost effective in fewer than half the scenarios examined. One reason for its poor showing is uncertainty about the future cost to curb carbon dioxide pollution. Coal plants emit more than twice as much carbon dioxide per unit of electricity produced as natural-gas-fired plants, but there's no cheap, easy way to capture and dispose of the greenhouse gas.

Even proposals to build so-called "clean coal" plants have been met with skepticism. This new technology, which primarily involves converting coal into a combustible gas for electricity generation, has been touted as a solution to coal's global-warming problems.

A hearing judge at the Minnesota Public Utilities Commission is urging commissioners to reject a plan for Northern States Power Co., a unit of Xcel Energy Inc., Minneapolis, to buy about 8% of its electricity from a coal-gasification power plant that was proposed by Excelsior Energy Inc., Minnetonka, Minn. The judge concluded the 600-megawatt Excelsior plant wouldn't be a good deal for consumers.

The judge concluded it would cost an extra $472.3 million, in 2011 dollars, to make the power plant capable of capturing about 30% of its carbon dioxide emissions, and another $635.4 million to build a pipeline to move the greenhouse gas to the nearest deep geologic storage in Alberta, Canada. Thus, $1.1 billion in pollution controls had the potential to inflate the cost of power coming from the plant by $50 a megawatt hour, making electricity from Excelsior twice as costly as power from many older coal-fired plants that simply vent their carbon dioxide. The recommendation will be considered by the commission on Aug. 2.

In the West, Washington has followed California in prohibiting utilities from entering into arrangements to obtain electricity from plants that aren't as clean as modern gas-burning plants. The intent is to discourage construction of conventional coal-fired plants anywhere in the region.

In January, Oregon utility regulators blocked PacifiCorp., a unit of Berkshire Hathaway Inc., from a plan to charge Oregon consumers for part of the cost of building new coal plants outside the state, saying Oregonians didn't need the power.

Even in states where coal projects are going forward, they are happening more often with a nod to environmental concerns. Xcel Energy, through its Public Service of Colorado unit, has agreed to obtain 775 megawatts worth of wind power to supplement the power that will come from a 750 megawatt coal plant it is building near Pueblo, Colo. It also has agreed to install more pollution controls at existing units, and to cut energy demand by more than 300 megawatts in coming years.

"It will change their portfolio in a fundamental way," says Vickie Patton, senior attorney for environmental group Environmental Defense in Colorado.

Rising construction costs are another reason that the future looks murky for big coal burners. Duke Energy Inc. created a stir eight months ago when it announced that the expected cost of a new twin-unit power plant in North Carolina had ballooned to about $3 billion, up 50% from about 18 months earlier. That run up in cost and other factors compelled the North Carolina Utilities Commission to nix one of the two proposed units.

The coal industry is looking for ways to make its product more palatable. Earlier this week, Peabody Energy and ConocoPhillips said they are exploring the possibility of constructing a coal-gasification plant at a mine in Illinois, Indiana or Kentucky that would convert coal into 50 billion to 70 billion cubic feet of pipeline-quality synthetic gas a year. It said it would have its analysis completed in early 2008. It would be cost competitive at $5 to $6 per million British thermal units, which is less than today's prices.

—Kris Maher contributed to this article.

Write to Rebecca Smith at rebecca.smith@wsj.com1

The CHAIRMAN. Our first panel is composed of Glenda H. Owens, the Deputy Director, Office of Surface Mining Reclamation and Enforcement, the U.S. Department of Interior, Washington, D.C., and Earl Bandy, the Chief, Applicant Violator System Office, Office of Surface Mining Reclamation and Enforcement, U.S. Department of Interior, Washington, D.C.

We welcome you both to the panel. Glenda, would you like to proceed first?

Ms. OWENS. Thank you.

The CHAIRMAN. And as I said earlier, we have your prepared testimonies. They will be made part of the record as if actually read, and you are encouraged to summarize.

You may proceed.

STATEMENT OF GLENDA H. OWENS, DEPUTY DIRECTOR, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

Ms. OWENS. Thank you, Mr. Chairman. Good morning, Mr. Chairman and members of the Committee.

I am pleased to appear before you today, along with Mr. Earl Bandy, on behalf of the Office of Surface Mining Reclamation and Enforcement on the occasion of the 30th anniversary of the enactment of the Surface Mining Control and Reclamation Act of 1977, or SMCRA.

I have been Deputy Director of the Office of Surface Mining Reclamation and Enforcement since 2001. Before that, I was an assistant solicitor for surface mining in the Solicitor's Office at the Department of the Interior, where I worked on various legal issues associated with the Surface Mining Program.

Over the 30 years since SMCRA was enacted, OSM has confronted many challenges in implementing the Act. Mr. Bandy is here today to share his experience in effectively addressing issues that threaten OSM's ability to ensure the reclamation which SMCRA envisioned: coal company bankruptcies.

Mr. Bandy has been integrally involved in these and other issues. He has worked at OSM for 28 years. He has been an inspector, an investigator, manager, head of the Applicant Violator System Office, and he is soon to be Director of OSM's Knoxville, Tennessee field office. I would like to ask Mr. Bandy to share some of his experiences in implementing SMCRA.

STATEMENT OF EARL BANDY, CHIEF, APPLICANT VIOLATOR SYSTEM OFFICE, OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

Mr. BANDY. Thank you, Ms. Owens. Mr. Chairman and members of the Committee, I am honored to be here today to discuss SMCRA, a law that I have spent nearly 30 years enforcing.

I was born and raised in a coal camp in Harlan County, Kentucky. My father and my grandfather were coal miners.

Today's industry is not the same as it was 30 years ago. As Mr. Duncan pointed out, most of the mom-and-pop operations are gone. Nearly 80 percent of the industry is publicly owned.

Although ownership of the industry has changed, the goal remains the same: to make a profit. Our goal as regulators also remains the same as it was in 1977: to achieve reclamation.

I want to share a few examples of how OSM and our state partners have adapted enforcement strategies in just the last four years to achieve reclamation in this changing economic environment.

Lodestar Energy held 75 permits in three states. The owners worked on Wall Street. When the company failed to produce a profit, they filed bankruptcy. Some of the coal operations were sold, and they planned to abandon 20 remaining unreclaimed sites. To further complicate matters, the surety company that guaranteed the bonds was in receivership.

Rather than give up, the state and Federal regulators combined efforts. Federal enforcement actions were issued, and we persuaded the owners that achieving total reclamation was the best solution. In the end, over $12 million was distributed among the three states to complete reclamation.

Horizon Natural Resources was the largest coal bankruptcy case in U.S. history. The regulators were faced with how to reclaim 300 abandoned sites in five states, at an estimated cost of $350 million. Although the surety bonds were viable, they were not sufficient to achieve reclamation on a permit-specific basis. Working together, the regulators developed a strategy to keep the assets with the liabilities, to utilize alternative enforcement, and to insist that no permit be left behind.

The result was a settlement agreement that created a reclamation-only company with sufficient assets to cover reclamation costs. I am happy to report the job is nearly three-quarters done. Reclamation liability decreases daily.

The final example is a case where the abandoned mines and permits were in Virginia, but the assets to reclaim the sites were in Texas. OSM again used enforcement to assist the state, and persuaded the owners to fund the reclamation. The savings to the Virginia bond pool was $1.5 million.

In all three cases I have described, regulators used the tools available in SMCRA to bring about reclamation. Although these were mainly state issues, OSM used its national presence to help the states reach beyond their borders to achieve reclamation.

I am proud of what we have accomplished in 30 years. I am not here to say SMCRA is without flaws, or our decisions were always correct. But I do believe SMCRA was good for the country, and one of the best things Congress has done for the environment.

I know what life was like before SMCRA. I have lived the changes. They are good. SMCRA was the right thing to do.

Thank you, Mr. Chairman. I would be happy to answer any questions that you or the Committee members may have.

[The prepared statement of Mr. Bandy follows:]

Statement of Earl Bandy, Chief, Applicant Violator System Office, Office of Surface Mining Reclamation and Enforcement (OSM), Introduced by Glenda Owens, Deputy Director, OSM, U.S. Department of the Interior

Mr. Chairman and Members of the Committee, it is a great honor to appear before you today as a witness for the Office of Surface Mining Reclamation and Enforcement (OSM) on the Surface Mining Control and Reclamation Act (SMCRA) of 1977.

August 2007 will mark the 30th Anniversary of SMCRA, and September 2007 will mark my own 28th anniversary working for OSM. I have served OSM as an inspector, investigator, and manager and, in a few weeks, I will begin a new position as Director of OSM's Knoxville Field Office with responsibility for the Tennessee Federal Program and with oversight responsibility for Virginia. In my various positions, I have inspected mine sites in at least a dozen states and visited coal mines in nearly every state in this nation with active operations.

For nearly three decades, I have seen how SMCRA works on the ground, and the evolution of its implementation. I have had the opportunity to personally witness many of OSM's greatest successes as well as some of its failures.

Like many of my colleagues in OSM, I grew up with coal. My late father and grandfather were coal miners in Harlan County, Kentucky. I was born in the company hospital and lived in a company-owned house. As a child, I learned that our existence revolved around coal. Not only did coal heat our house, it also put the groceries on the table, clothes on my back, and toys in my stocking. I also remember learning that the coal company made the rules and that was the final word.

I spent my childhood hunting, fishing, gardening, climbing trees and climbing mountains. My great appreciation for nature led me to study earth sciences and, specifically, reclamation in college. My first job was as an inspector for the State of Kentucky.

The Need for SMCRA

During the mid 1970s, most counties in the Appalachian coal fields were dotted with hundreds of small surface mines. Small operators were often heavily in debt and light on experience. One unanticipated event could easily lead to a total business failure. In contrast, large operators supported local economies by providing large numbers of jobs, related infrastructure, and a local revenue stream.

From both the small and large operations I saw streams choked with sediment, and spoil and rocks dumped on the downslope in steep terrain. I witnessed the results of unpredictable blasting events and saw the exposed highwalls and abandoned entries that were left behind. These failures to reclaim the land resulted from many failures in the system that existed then—under-capitalized operators and highly variable regulatory standards and inconsistent enforcement from one state to the next. This created an economic advantage for operations in states with low reclamation standards or lax enforcement. In short, the reclamation principles now embodied by Congress under SMCRA were not used in a consistent way by state regulators or by the industry prior to its passage.

It was these conditions that were to be addressed by SMCRA, which was enacted by Congress in 1977. Mr. Chairman, you were there, and you don't need to be reminded that SMCRA was hotly debated, vetoed twice and remained controversial for years. There were those who thought that enacting SMCRA was the end of the world. A great many disparaging things were said then about SMCRA and about OSM. Given this tense environment, it is amazing to me that the authors of the SMCRA had the foresight to see so far into the future and give us such a coherent framework in a very complex document. I can say that now, having witnessed three decades of SMCRA's development.

Implementation of SMCRA

SMCRA leveled the playing field in a number of ways. It standardizes coal mining and reclamation regulations from State to State. It assures that coal mining operations in one State do not have an economic advantage over operations in another State. It requires the companies to take responsibility for the impacts of their operations. Perhaps most importantly, it requires that citizens have a voice in the permitting process, enforcement of regulations, and rulemaking.

During the early years of SMCRA's implementation, I believe the OSM inspector was the most unpopular person in the coal fields. The State agencies just could not imagine someone telling them how to permit or inspect operations within their boundaries. The coal operators disliked OSM even more and often attempted to play us and the states against each other. Finally, there were the citizens. They were upset because they thought we should put an end to all surface coal mining operations.

Despite the resistance to change, OSM inspectors marched on. If someone threatened us, we figured they were just having a bad day; if our tires were flattened, we simply changed the tire; if we were refused entry at the mine, we returned with the U.S. Marshall. We did not go away, and slowly, we began to see a change.

In those early years, OSM experienced one of its first course corrections. Initially, each violation carried a mandatory civil penalty that increased daily if operators did not comply. Very soon, using our enforcement authority, OSM had issued thousands of violations and assessed millions of dollars in unpaid federal civil penalties. However, OSM was doing little to compel compliance beyond requiring cessation of operations, and basically nothing was done to collect outstanding penalties from the under-capitalized small operations that found it easier to quit than to comply, particularly when facing penalties that were increasing each day. Further, some of those same individuals that abandoned sites created new companies and came right

back in business under a new name. Citizens groups sued OSM because of the huge backlog of unpaid fines that had developed.

In 1980, OSM revised its rules to place a cap on penalties for unabated violations and required the use of one or more alternative tools to achieve compliance. Soon after, my job changed from being an inspector to being an investigator for a task force created specifically to deploy one of those alternative tools from the tool bag Congress gave us in Section 521(c) of SMCRA. This provision authorizes OSM to compel individuals who own or control coal mines to correct violations attributable to a corporate permittee.

Members of the task force worked closely with the Solicitors Office to determine if owners or controllers had sufficient corporate or personal assets for us to compel them to reclaim the land. That Task Force and resulting case law established the principle that the ability to control a coal mine creates the duty to comply with environmental aspects of SMCRA. I investigated a number of these cases and when it was all said and done the result was thousands of acres of land reclaimed and collection of many outstanding penalties. This concept, known as alternative enforcement, has continued to gain momentum in getting land reclaimed and, more importantly, serves as a powerful deterrent for companies who consider abandoning a site without conducting proper reclamation.

Another problem in the early days was the two-acre exemption, a loophole in the law by which large mining companies avoided regulation by working through contractor companies to mine along a string of operations, which individually could qualify for the two-acre exemption. Congress eventually closed the two-acre exemption loophole, but that did not eliminate all abuses that were associated with coal mining through contract operators.

I investigated many instances in which well-heeled coal operators who used contractors (who had to deliver the coal they mined to them) were claiming they had no responsibility for complying with SMCRA at these contract operations. OSM and the States had to start paying attention to the ability of larger coal companies to control those contractors and hold the controlling companies responsible under appropriate circumstances. In response to a 1985 Court case settlement involving civil penalty collections, OSM developed the Applicant/Violator System (AVS) to track control of mining operations and hold controlling companies and individuals responsible for mining within the regulations, paying fees, and reclaiming the land.

Since 1990, I have served as investigator, team leader and manager of the AVS Office. The AVS implements another tool Congress supplied in Section 510(c) of the Act. Under this provision of SMCRA permittees know that if they control a site with outstanding violations or unpaid penalties or fees, they cannot obtain additional permits until the outstanding issues are resolved. In my opinion, this has been SMCRA's most effective tool in changing the behavior of coal companies.

AVS has been very effective in making sure those companies and individuals interested in remaining in the coal mining business take care of past problems they can be linked to. The AVS has given us a means of resolving unabated state and federal environmental violations and civil penalty assessments without resorting to court action to compel reclamation. Since the AVS was created we have resolved hundreds of cases attributable to past operations of the major producers. One of those accounted for reclamation of nearly 500 contract mining operations in three states. The reclamation alone was valued at over five million dollars. The AVS has produced thousands of settlement agreements resulting in considerable reclamation and millions of dollars of payment in fees and penalties for both OSM and the State Regulatory Authorities.

In the 1990s, the hostile relationship between States and OSM began to fade. This began with the effort by Director Robert Uram to refocus OSM's oversight role on results and to involve the states more directly in the evaluation process. Rather than spend days pointing out each others shortcomings, the States and OSM began working as partners to find resolutions to problems. That relationship, the true "cooperative federalism" envisioned in SMCRA, has continued to build to this day.

More recently, the State Regulatory Authorities and OSM have added a new meaning to cooperative federalism. Beginning in 2002, we saw several entities file bankruptcy in an attempt to evade reclamation obligations. These were multi-state operations where the mines and liabilities are located in one state and the assets and ultimate controllers are located in another. One case involving 425 SMCRA permits located across five states was the largest coal bankruptcy case in history. By utilizing duel enforcement and combining legal resources, the States and OSM together sent a clear message that it was unacceptable to socialize reclamation liabilities. The result was reclamation activities and assurances valued at nearly 400 million dollars.

The Continuing Legacy of SMCRA

I cannot imagine what our nation's land and water resources would be today if it were not for SMCRA. Congress' enactment of such a forward-thinking law was an awakening and recognition of the potentially dangerous and harmful cumulative effects of coal mining on the land and water. After years of resistance, coal companies acknowledge that reclaiming the land benefits them as well as the communities in which they operate. I believe that these companies now approach reclamation thoughtfully, with a businesslike attitude and an awareness of environmental impacts that did not exist before SMCRA. This is the true success of SMCRA.

About 29.5 billion tons of coal have been mined while SMCRA has been in place. Most of that, about 90 percent, was used to generate electrical power. During this same time, the coal mining industry has successfully reclaimed more than 2 million acres (2,238,560) of mined lands. The reclamation accomplishments at many of these mines are truly impressive, exceeding all State and Federal regulations. Millions of trees have been planted for both commercial forestry and wildlife habitat, trees that recreate or extend the hardwood or pine forests native to the area. Wetlands, often part of mine drainage control, also have been reclaimed and restored. Mines that have been reclaimed for farmland show high levels of productivity. In re-mining operations, similar results occur with the added benefit of cleaning up abandoned surface, as well as underground mines.

In addition to ensuring that active mines operate in an environmentally-sustainable manner, the other daunting task assigned to OSM under SMCRA was to restore mined lands that were abandoned before the law was passed. Today, almost 240,000 acres of high-priority mine lands abandoned before 1977 have been reclaimed. The Abandoned Mine Land Program has eliminated safety and environmental hazards on a total of 314,108 acres. As with the active mining operations, the reclamation accomplishments are extensive and can now be done to a standard barely imaginable when the law passed. Useful buildings have been saved from collapse, sheer highwalls turned to rolling grassland, streams where fish could not live now support thriving wildlife populations. Forests are beginning to grow.

The credit for these accomplishments belongs largely to the people working in the regulatory and reclamation programs for the coal States and Indian Tribes. There are about 2,400 people in this country responsible for implementing the Surface Mining Act. Only a little over 500 of them work for OSM. That's the way Congress envisioned things working when it gave us SMCRA. We try to set the standards and solve the problems at the federal level, but it's the States and Tribes and their citizens who know their own issues best.

The first 30 years of SMCRA have shown that we can balance the nation's need for domestic coal energy with protection for the environment. Mining should be a temporary use of the land and when mining is done, the land should be put back the way it was or put to some good use.

The Next 30 Years of SMCRA

Over the next 30 years, I expect that vibrant debate will continue over provisions of the law or how it's implemented. Many citizens are opposed to mining techniques like longwall mining or mountaintop mining. Some oppose the use of coal ash in reclaiming abandoned mines. Ongoing litigation continues between OSM and the mining industry over issues like ownership and control.

As someone who has lived through and participated in many of the debates in SMCRA's history, I have confidence that eventually these questions will be settled, and the discussion will move on to new issues. When we experience failures, as in the examples I have cited today, we should do our best to turn them into successes. SMCRA will be better for it, as will the coalfields, communities, and the States.

My generation—SMCRA's first generation—is getting to be retirement age. In the next five or six years we're going to be replaced by a new generation. These new folks coming up bring with them new ideas and new technological tools my generation could not have dreamed possible. For example, technology continues to provide us with new ways to measure and mitigate environmental impacts. One of the challenges we face now is how to combine what my generation has learned with what the next generation can discover and use it to benefit Americans living and working in the coalfields.

Conclusion

I appreciate this opportunity to provide my personal insight into 30 years of the Surface Mining Control and Reclamation Act. I am not here today to say SMCRA is without flaws or has always been perfectly implemented. But I do believe that SMCRA has been good for the country. It may well be one of the best things Congress has done for the environment.

So, as a boy who grew up in the old coalfields, who has devoted his career to OSM, and who has seen dramatic changes for the better because of what Congress did back in 1977, I am here to say thanks. It was the right thing to do.

Mr. Chairman, I would be happy to answer any questions that you or members of the Committee may have.

The CHAIRMAN. Thank you both for being with us this morning. And Mr. Bandy, thank you for your testimony.

Mr. BANDY. Thank you.

The CHAIRMAN. I appreciate the manner in which you gave it. It was from the heart, and so much so that I have to question whether OMB actually heard it. Or whether they cleared it or not would be a better question. Do you happen to know?

Mr. BANDY. Mr. Chairman, I know it was submitted to OMB.

[Laughter.]

The CHAIRMAN. Deputy Director Owens, what is the status of your implementing the National Research Council's recommendations on the use of coal power plant waste in mine reclamation?

Ms. OWENS. Mr. Chairman, OSM published an advanced notice of proposed rulemaking in March of 2007. The comment period of that notice closed in June. We are currently reviewing comments, and our plan is to get a proposed rule out by the end of the year.

The CHAIRMAN. Is this going the way of your agency's reaction to the National Academy's Coal Waste Empowerment Study? The number of National Academy assigned studies? The Office of Surface Mining is ignoring or starting to stack up, it appears, like building blocks.

Ms. OWENS. We have no intention of ignoring it, sir. In fact, as I said, our every intention is to have the rule published by the end of the year.

The CHAIRMAN. OK. You spoke of the cooperative Federalism with respect to a relationship between the agency and the states. My fear is that this may have evolved into cooperative cronyism. Enforcing SMCRA is not about winning a popularity contest.

For instance, does deferring to a state's 10-day notice response constitute independent oversight that the Act envisioned?

Ms. OWENS. Sir, I think that the Act requires, because of the way that the Act is constructed, and that is what the state's taking primacy and having primary regulatory responsibility, and OSM functioning in an oversight capacity, it is our responsibility to allow the states to take the corrective action that is necessary, which is why the Act provides for the 10-day notice process.

The CHAIRMAN. But that does not preclude Federal enforcement. Is that correct? Would you agree with that statement?

Ms. OWENS. Certainly not, sir, it does not. In the event where the determination is made that the state has not taken appropriate action, OSM will take necessary action.

The CHAIRMAN. OK. Deputy Director Owens, in 1998 I publicly expressed concern with a report that the majority of mountaintop removal mines in West Virginia were given permits without AOC variances. A great deal of litigation and policy changes have taken place since that time. However, my concern remains. And I touched upon this in my opening remarks. And that is, to what extent are mining operations that are viewed as mountaintop removal technically not categorized as such?

They may use a combination of point removal, area mining, and contour cuts. And for all intents and purposes have the character of a mountaintop removal operation, but have not received an AOC variance, and have not submitted a post-mining land use plan that includes those higher uses that would benefit the economies of coalfield communities, the better post-mining uses to which I referred.

I would expect your agency has looked into this matter as part of its oversight. Would you care to comment?

Ms. OWENS. Mr. Chairman, that is, in fact, correct. OSM is very much aware of the issues associated with mountaintop mining. As you mentioned, there has been litigation on the issue since 1998. We have engaged in rulemaking, and in fact currently we are working cooperatively with state and Federal regulators in the development of guidance on certain issues related to mountaintop mining, such as AOC, the variances, the post-mining land uses, and return of mined land to useful and productive hardwood forestry.

We have also engaged in a national rulemaking on two of the issues associated with mountaintop mining: extreme buffer zone and excess spoiled fuel rule. We have a proposal that is in final review, and it should be published in the near future.

The CHAIRMAN. Well, I would only respond that it has been a little over 10 years I think since we last had our oversight hearing, where I asked a similar question and got a similar answer.

Ms. OWENS. Well, I wasn't here 10 years ago. But I can tell you that I was in the Solicitor's Office at that time, and I was involved in the litigation on mountaintop mining. I know that it has been a struggle getting through these issues because of the controversies and the confusion that the regulation has wrought, which is why OSM now feels that a national rulemaking on these issues is appropriate.

The CHAIRMAN. But does OSM have a definition of AOC, approximate original contour?

Ms. OWENS. We do not have a definition at this point. We are, in fact, working on a definition, looking into whether the definition at this time is appropriate.

The CHAIRMAN. Thirty years, and we are still looking for a definition of AOC.

Ms. OWENS. I am sorry. Yes, sir. I thought that was a statement.

The CHAIRMAN. And your response is yes. OK. Let me ask one more question.

Turning to the recently enacted amendments to the Abandoned Mine Reclamation Program, is it the agency's view that as a result of those amendments, the states cannot use their AML grants for non-coal mine reclamation.

Ms. OWENS. That is an issue that we are currently working with our solicitors on, to make sure that we follow the law as written. So we are, a decision has not been made, but we are working with our solicitors on that issue.

The CHAIRMAN. Continuing on this issue, and I have already taken issue with Brent Wahlquist on this when he was Acting Director, the Office of Surface Mining has taken the position that the minimum program states will not receive the full $3 million minimum program amount until Fiscal Year 2010. This is a great in-

justice; it is not how I read the law. And I would appreciate if you would elaborate on how this position is being taken.

Ms. OWENS. Again, Mr. Chairman, that issue, we understand the position of the Chair. We are looking at and working with our solicitors to make sure that we follow the written law.

The CHAIRMAN. That you follow, I am sorry, the written law?

Ms. OWENS. Written law. The law as it is written.

The CHAIRMAN. Are you talking about the amendments that we enacted end of last session?

Ms. OWENS. Yes, I am, sir.

The CHAIRMAN. Have you perhaps not read them yet?

Ms. OWENS. I have read them.

The CHAIRMAN. Perhaps we have a disagreement of the intent of that legislation, then.

My time is up. I will yield to the Ranking Member, Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. Ms. Owens, what is the legal foundation for the regulations under the SMCRA of surface mining on non-Federal lands? What is the legal foundation?

Ms. OWENS. I am sorry, sir, could you—I am not understanding your question.

Mr. PEARCE. The legal foundation for the national regulations for those non-public, non-Federal lands.

Ms. OWENS. Non-public, non-Federal lands?

Mr. PEARCE. Yes, the mining——

Ms. OWENS. The legal foundation for all of our regulations are the Surface Mining Act.

Mr. PEARCE. OK. But the underlying foundation of those regulations, I understand it comes from the Act. I am asking about the legal foundations.

Ms. OWENS. The Act does provide the legal foundation, unless I am missing something, sir. I apologize.

Mr. PEARCE. Have any of the foundations been challenged in court?

Ms. OWENS. Of regulation?

Mr. PEARCE. The legal foundations for the regulation. In other words, has a court looked at the legal foundation for the regulatory basis of SMCRA?

Ms. OWENS. Mr. Congressman, as I am sure you are aware, most of, or I should say a large percentage of regulations that are promulgated and that have been promulgated under SMCRA over the years and currently are challenged in court.

Mr. PEARCE. And generally what is the finding of the court? Supporting the regulatory basis, or are they not?

Ms. OWENS. We have had instances, because of the breadth of the challenges to the regulations, we have prevailed in some cases and not in others. And when we have not, we have taken action accordingly with the courts' decisions.

Mr. PEARCE. Do you think that Congress can effectively preempt states' regulation of oil and gas production on non-Federal lands? Do you think that we can do that here in Congress?

Ms. OWENS. Well, Congress has the power to write the laws. I would assume that if you write them in that way, you could.

Mr. PEARCE. OK. Do you know, Mr. Bandy, you had mentioned that you kind of confirmed the statements made by Mr. Duncan,

that we have evolved from the mom-and-pop operations to 80 percent publicly traded. Is that healthy for the industry? Has that been a good change?

Mr. BANDY. Well, the industry has changed a lot in 30 years. The amount of work that goes into obtaining a permit is very expensive. There is a lot of engineering and design work that goes into that, and a lot of equipment cost. It is expensive.

It is being approached more as a business approach. And I see maturity in the industry, and likewise in the state programs.

Mr. PEARCE. As a regulator looking at it, is it a healthier industry now? Is it safer, cleaner, everything that regulators look at?

Mr. BANDY. Yes, sir. We have looked at numbers, and one of the things I currently do is the applicant violator system, which looks at violations, companies with violations. And we see a decreasing number of non-forfeitures and a decreasing number of cessation orders when you compare back to previous years.

The industry as a whole has consolidated, and you see quite a bit of consolidation of the industry today.

Mr. PEARCE. I wonder how many people were employed in the coal mining industry.

Mr. BANDY. I think it is about 250,000, but I am not positive of that, nationwide.

Mr. PEARCE. And an average coal miner might make what?

Mr. BANDY. I would say $100 a day.

Mr. PEARCE. A thousand dollars a week then, more or less.

Mr. BANDY. I guess so.

Mr. PEARCE. So it is pretty good, high-paying jobs, compared to New Mexico scale. And the contribution to the GDP? Ms. Owens, would you know that?

Ms. OWENS. No, sir, I am sorry, I don't.

Mr. PEARCE. I think it is about $100 billion. A lot of those are union jobs. I think what we do here has a great effect on the economy, the cost of our energy, and on the jobs in the coal industry.

Thank you, Mr. Chairman. I see my time is about to elapse.

The CHAIRMAN. Jim, let us see. Let me recognize in order in which you came in. Mr. Grijalva, Mr. Inslee.

Mr. INSLEE. Yes. A few months ago I talked to a lady from Marsh Fork Hollow. And she told me about the destruction of her community by mountaintop mining. And as someone who is not personally familiar with it, it was really distressing. She told about her son going out; the first time it really got bad is in the creek behind their house, a place that they had played for generations, becoming just, the water just looked threatening. Not a place where a kid could play any more.

Then they started talking about the dust. Then they talked about the dam, that she couldn't sleep at night because they all had to sleep in one room. They were worried it was going to collapse. And they eventually had to leave. And this whole community basically, not on the land that was owned by the mine, but adjacent to it. And they all left.

And listening to her, it was apparent to me that Federal policy had failed to protect Americans from some of the devastation caused by this particular kind of mining.

I am not as familiar with the specifics as the Chairman and the other members of the Committee. I am concerned when I hear that there has apparently been a violation of a failure by the Federal government to protect against the destruction of streams by this, by issuing permits, if you will, at the same time that we are destroying these stream beds.

It seems to me like there needs to be some significant review of the performance of the Executive Branch, and/or a change in the law, given the destruction that at least I have been told is occurring. Could you both comment on that?

Ms. OWENS. Mr. Congressman, as I mentioned earlier, OSM is painfully aware of the issues associated with mountaintop mining. And in an effort to address many of those issues, we have been and continue to work cooperatively with the state and Federal regulators.

One of the things that we are currently doing is working with the EPA, the Corps of Engineers, the Fish and Wildlife Service, to come up with ways to ensure that we issue better permits; that there is coordination between those agencies—in particular, the Corps of Engineers—that have responsibility to ensure that the Clean Water Act requirements are met.

In the stream buffer zone regulation that we are proposing, one of the issues we are addressing is to clarify the conditions under which mining activities can occur in or near streams. So we are looking at those issues and attempting to address them.

Mr. INSLEE. What is the status of this? At one time there was litigation, I think last year, where the Administration was allowing mining that they were aware were filling in stream beds, and actually physically destroying the stream bed. And my understanding is that the Administration allowed that to occur. There was litigation, and my understanding is the court issued an injunction or stopped the Administration somehow from doing that. What is the status of that?

Ms. OWENS. Well, I think you are referring to a District Court decision, which the District Court Judge did not allow the decision; said that there could be no placement of spoil in perennial streams. However, the Fourth Circuit Court of Appeals overturned that.

Notwithstanding that fact, we recognize that there are issues, and we have begun to address them in the proposed rulemaking.

Mr. INSLEE. Well, maybe you can tell me. Do you think it should be the law that mountaintop mining could result in destroying these streams? Do you think that should be the law?

Ms. OWENS. No, I don't.

Mr. INSLEE. And under the current law, are they allowed to do so?

Ms. OWENS. The law does not allow for destroying of the streams. In fact, one of the issues associated with the stream buffer zone rule is some of the confusion we realized through the course of the litigation over this is that there was confusion over the interpretation of the rule, which is why we have——

Mr. INSLEE. Do we need a statutory change to clarify that? I mean, if you are telling me that you think they shouldn't be destroyed, but the Fourth Circuit Court allowed the mining to go through, which dumped spoils in a stream bed and literally de-

stroyed it, does that suggest we need a statutory change? Or is the Executive just not applying the statute correctly?

Ms. OWENS. I think our regulations have attempted to apply the law correctly. We have, however, as I said, as a result of litigation and the different results that came out of that litigation, our regulation now attempts to add some clarity to the confusion that exists.

Mr. INSLEE. And have those then issued? Is there a proposed regulation out?

Ms. OWENS. No. The proposed regulation is in final review, and we expect that it will be issued soon. In the near future.

Mr. INSLEE. Well, we hope to see it. Thank you.

The CHAIRMAN. The gentleman from North Carolina, Mr. Shuler?

[No response.]

The CHAIRMAN. The gentlelady from Guam, Ms. Bordallo?

[No response.]

The CHAIRMAN. The gentleman from Maryland, Mr. Sarbanes?

[No response.]

The CHAIRMAN. OK. Oh, I am sorry.

Mr. SHUSTER. You forgot me over here.

The CHAIRMAN. The gentleman from Pennsylvania, Mr. Shuster. I am sorry, Bill.

Mr. SHUSTER. Thank you very much, Mr. Chairman. I am equally concerned about what has happened in mining and to the environment. But I have seen in my district communities destroyed, not necessarily because of what has happened to the environment, but because of what has happened to coal mining, and the burden and the regulatory burden that the government has placed on it now.

I certainly think that we have to have laws in place to protect the environment, but we also have to make sure that we protect this industry so that it can create the jobs that are so necessary to get the coal out of the ground, to be able to use it for power in this country.

As I have said, I have seen a number of communities that have been destroyed and are trying to rebuild themselves, trying to open up mines that were at one time very productive mines, closed down for various reasons. But the process they have to go through is very burdensome. It takes a long period of time, it is very expensive. And I hope that we can streamline some of this, so that we can open some of these mines that, as I have said, had been mined in the past in western Pennsylvania, and are important to this nation, important to my district, important to regular people.

I think somebody mentioned about the kind of money a miner makes today. One of the, I guess it is a good problem we have, is we can't get enough miners in western Pennsylvania to mine the coal. So I am very concerned about the regulatory burden that we place on these companies.

One question I wonder if you might be able to comment on, on lands that have been reclaimed. What is the record on their productivity once they have been reclaimed, that you have found?

Ms. OWENS. I couldn't answer across the board, but I can say that one of the initiatives that OSM is engaged in now is ARRIs, our Appalachian Regional Reforestation Initiative. And that is an effort to return mined lands to productive hardwood forests. And

of course, that has all the benefits of the reforestation creating natural habitat for wildlife and carbon sequestration possibilities.

The goal of the Surface Mining Act and the regulatory program is to ensure that post-mining land uses return the land to at least as good, if not better, uses than prior to mining.

Mr. SHUSTER. And do you have any statistics, any records on if that has been the case?

Ms. OWENS. I can get statistics. I don't have any with me.

Mr. SHUSTER. But it has been my, in traveling throughout my district—of course, mining is important, but also hardwoods. Pennsylvania has some of the greatest hardwood forests in the world. And when I have been talking to folks that timber, they say the productivity in cases has exceeded what it was before mining went there. But again, I would like to see some statistics on your department, if you keep that and track those kinds of things. I think it would be very important to us as we craft legislation, as we go through this Act.

The other question that I have is concerning the fees that are collected from the operators. They are done on a voluntary basis. What is your feeling? Do you feel as though they are being collected? Are we getting 100 percent, or close to 100 percent, of what we think should be collected, to be able to do these recommendations?

Ms. OWENS. Fees assessed against coal produced?

Mr. SHUSTER. Yes.

Ms. OWENS. Well, that is not voluntary. That is required under the Act.

Mr. SHUSTER. I know that. But the reporting, I guess, is voluntary, is that correct?

Ms. OWENS. I am sorry?

Mr. SHUSTER. The reporting on the production, is that voluntary, or is there an auditing process in place?

Ms. OWENS. That is required, as well. And I believe we have 99 percent compliance with that requirement.

Mr. SHUSTER. OK. The other thing that I wanted you to comment on was that in recent years they have increased the flexibility of how those monies can be used. A portion of it, or it seems to be an increasing portion of it is going into water systems, which of course is important. But I am concerned that the money is not being spent on reclaiming the land, and then down the road somewhere we need to figure out how to get money in to improve those water systems.

What do your numbers show as far as that? Are we seeing a significant increase in those monies being used for water treatment facilities instead of the reclamation?

Ms. OWENS. I am sorry, I don't have the statistics on that. I do know that the monies, the fees that are collected on the coal produced go into the Abandoned Mine Land Fund, and the projects that that fund finances are those that come from our Abandoned Mine Land Inventory System. And those are high-priority projects that the Act established and requires us to require states with abandoned mine land programs to clean up.

Mr. SHUSTER. Well, at some point, you probably have statistics on that, also. Again, my question was because of the flexibility we

put in the law, more of that money is going into cleaning the water systems instead of the reclamation projects. Sometimes that goes hand in hand, but I wonder if you could give me some statistics on that and see where that money is flowing.

Ms. OWENS. To the extent that we can get those, I will.

Mr. SHUSTER. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Idaho, Mr. Sali.

Mr. SALI. Thank you, Mr. Chairman. Ms. Owens first, and then Mr. Bandy. And just a short answer.

Do you feel like your office has been able to do a good job of regulating coal mining and reclaiming land, and protecting the environment through the Surface Mining Act?

Ms. OWENS. I think that we have, what we have done is done a good job. We are in the process of—and Mr. Chairman alluded to this earlier—establishing a regulatory framework that allows for the states and tribes to regulate under the surface mining programs.

Ninety-seven percent of the coal that is produced in this nation is permitted and regulated under the state regulatory programs. And it is in our interest to make sure that those states succeed. And the way——

Mr. SALI. Do you believe they are succeeding in taking care of the environmental concerns and whatnot with regulating coal mining in this country today?

Ms. OWENS. I think they are improving. As you know, this has been a 30-year effort. We have had some successes, we have had some challenges. We have had some failures. But we have not ceased to work on the improvement of our effort, and to continue to work cooperatively with the states.

What we have found is that our increased cooperative effort with the states is yielding better results than when we were in a confrontational mode with them. So it can——

Mr. SALI. Mr. Bandy, do you feel like your office has been able to do a good job of regulating coal mining in this country and protecting the environment, all those goals that are set out in the Surface Mining Act?

Mr. BANDY. Yes, sir, I do. I don't think we have been perfect, but I would hate to see what it would have been like without us 30 years ago, in 30 years. I see a lot of maturity and a lot of dedicated people.

The problem with, or the issue with being a regulator is you kind of straddle the fence. And nobody is ever really happy with your decision, neither the industry or the citizens. But you try to find that balance, as laid out in the purposes of the Act, to balance our country's energy needs with their environmental concerns.

Mr. SALI. And along those lines, I guess the point I am trying to get to is this. I know you have new regulations that have been promulgated and will guide the future, I guess is probably the best way to say that.

Is there any authority that you lack in your office, under the Surface Mining Act, that you need to be able to go out and protect the environment in ways that it is not being protected today? And I recognize, Mr. Bandy, that you use judgment; sometimes you don't use the full extent of your authority. But is there a place

where you run up against a lack of authority from your office to be able to regulate for the environment? To be able to punish people who offend? To be able to come up with regulations that will take care of any issues that have come up? And I say that, tempering, knowing that the courts get involved and sometimes interpret things differently.

But do you lack authority to deal with the issues that are supposed to be taken care of under the Surface Mining Act?

Mr. BANDY. No, sir. One of the things that inspectors and regulators have dealt with for years, how to deal with bankruptcies. And pretty much, we figured, and when they file bankruptcy, it is all over; everybody loses.

But the cases I have pointed out in my oral testimony is it is an example of how we tweak and reused what SMCRA gave us 30 years ago in today's economy, in today's environment, to get favorable results.

Mr. SALI. Ms. Owens, would you respond to that question? Is there any place where you lack authority to act that you would need Congress to engage?

Ms. OWENS. Nothing that comes to mind immediately, Mr. Congressman. As Mr. Bandy said, we have been able to, through the years, adapt to the needs of the Surface Mining Program. The challenge that we have, as he also stated, is striking that balance. And I think that we have done a pretty good job of attempting to do that.

Mr. SALI. You would agree that striking that balance generally means that you would exercise less authority than you have under the Act?

Ms. OWENS. No, not at all. It just means that we exercise the authority that is given us, recognizing the need; the need for coal by the nation. But then also to make sure that it is done in an environmentally sound manner. And I think SMCRA gives us the tools to do that. And I think we are doing a pretty good job of utilizing those tools to that result.

Mr. SALI. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Nevada, Mr. Heller.

Mr. HELLER. No questions. Thank you.

The CHAIRMAN. The gentleman from New Jersey, Mr. Holt.

Mr. HOLT. I pass, Mr. Chairman.

The CHAIRMAN. OK. Before we let you go, let me just go back one more time to the definition of AOC. You are saying 30 years now, we still don't have a definition of approximate original contour. I would seriously, seriously ask you, how do you expect anybody to comply with the law if 30 years later you still don't have a definition of what one of the basic tenets of that law, return to AOC, approximate original contour?

Ms. OWENS. Mr. Chairman, I think you are aware that there is a statutory definition of approximate original contour, and that is the definition that we follow.

The CHAIRMAN. I have in front of me the original SMCRA Act, 1977. My copy. My notes I wrote on it 30 years ago. I wish I still had a picture of what I looked like at that time to put in here, as well.

[Laughter.]

The CHAIRMAN. But here are my notes. "Strong bill." And "requiring return to approximate original contour." My eyesight is not as good as it was 30 years ago, either. Well, my handwriting has gotten worse, that is for sure.

The bottom line is I wrote on here, "approximate original contour and better post-mining uses of the land." This bill was supposed to address the problems of small operators and permits, the states' rights if the states meet Federal guidelines. This is a note I must have written for a press interview or something. But anyway, approximate original contour. And we still don't have a definition.

Ms. OWENS. Well, Mr. Chairman, unfortunately we didn't have the benefit of your handwritten notes. We only have the statutory definition, which we have attempted to follow over the years.

The CHAIRMAN. Well, I would hope we could get something more definite than a statutory definition, so that we know what is legal and how to comply, the operators know how to comply with the law. I think the agency must have a definition.

Ms. OWENS. Well, we are, in fact, now working with the state and Federal regulators to provide guidance. We are working to develop guidance on AOC and the variances and post-mining land uses.

The CHAIRMAN. OK. Thank you both for your testimony today.

Ms. OWENS. Thank you, Mr. Chairman.

Mr. BANDY. Thank you.

The CHAIRMAN. Thank you. Our next panel is composed of Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission, Herndon, Virginia; Stephanie R. Timmermeyer, the Cabinet Secretary, West Virginia Department of Environmental Protection, from Charleston, West Virginia; John F. Husted, Deputy Chief, Division of Mineral Resource Management, Ohio Department of Natural Resources, Columbus, Ohio; Mr. John Corra, the Director of the Wyoming Department of Environmental Quality, Cheyenne, Wyoming.

The Chair would like to welcome the panel for being with us this morning, some of whom have traveled long distances. And again, I commend you for your work. Stephanie, it is good to see you again, and thank you for what you do in our home state of West Virginia. I hope the baby is doing well.

We have your prepared testimony; it will be made part of the record as if actually read. And I understand, Mr. Conrad, you will be the lead-off witness.

Mr. CONRAD. Mr. Conrad, if you would give me a moment here while we set up.

The CHAIRMAN. OK.

STATEMENT OF GREGORY E. CONRAD, EXECUTIVE DIRECTOR, INTERSTATE MINING COMPACT COMMISSION, HERNDON, VIRGINIA

Mr. CONRAD. Good morning, Mr. Chairman, members of the Committee. I appreciate the opportunity to appear before you this morning, and to introduce the perspective from the states concerning the Surface Mining Control and Reclamation Act, as we reflect on 30 years of its implementation.

I will present a general overview of state regulation under SMCRA, and then my colleagues from West Virginia and Wyoming will share a more regional perspective, followed by a viewpoint from those who operate abandoned mine land programs for the states and tribes.

As one of the original framers of SMCRA, Mr. Chairman, you are very familiar with the state lead concept that underpins the implementation of the Act. In designing a regulatory model that would be both effective and efficient, Congress decided that the states should be authorized to regulate surface mining and reclamation operations within their borders.

Due to the diversity of terrain, climate, and other conditions related to mining operations, it simply made sense to rely upon the states to implement programs based on national standards. The other part of the equation was financial. It was anticipated, and indeed has proven true, that the states would be able to operate their programs at significantly lower cost than the Federal government.

We are happy to report today, Mr. Chairman, that the regulatory regime established by SMCRA is a success, and is working notably well. The purposes of the Act are being accomplished, and the overall goal of establishing a nationwide program to protect society and the environment from the adverse effects of past and present coal mining operations has been achieved.

Drainage and runoff controls are in place to ensure that downstream waters are not filled with sediment or otherwise polluted. Blasting operations are controlled to prevent damage to nearby property. Final grading and reshaping of mine lands are undertaken to ensure that they are stable and approximate their original contour. Topsoil is preserved and then replaced to accomplish high levels of productivity, and mine lands are reclaimed to a variety of beneficial uses, and then returned to local landowners in equal or better condition than before mining. And all of these statutory requirements are being accomplished while maintaining a viable coal mining industry that is essential for meeting our nation's energy needs.

Examples of some of the excellent reclamation that is occurring under the Act, along with some of the various post-mining land uses, can be seen in our two exhibits, which highlight area state and national reclamation award winners. I would request permission to submit these two exhibits for the record. Thank you.

As we look to the future, Mr. Chairman, the states faced several challenges, perhaps the most crucial being adequate funding for state regulatory programs. Pursuant to Section 705 of SMCRA, OSM is authorized to make annual grants to the states of up to 50 percent of the total costs incurred for the purposes of administering and enforcing their programs. This percentage has increased for states regulating on Federal lands.

As you know, these grants are essential to the full and effective operation of state regulatory programs. For the past several fiscal years, the amounts for state Title V grants has been flatlined, as you will note in this graph. What this does not show is that these grants have been stagnant for over 12 years.

Looking at the graph once again, another disturbing trend is evidenced, and that is that the gap between the state's requests and

what states are receiving in annual grants is widening. In the end, this increasing gap is compounding the problem caused by inflation, and uncontrollable costs is undermining our efforts to realize needed program improvements and enhancements, and jeopardizes our efforts to minimize the impact of coal extraction operations on people and the environment.

Should the Federal government be faced with operating these programs, the impact on their budget will be significant. So for all of these reasons, we have urged Congress to increase funding for state Title V grants in OSM's 2008 budget to $67 million. We are encouraged that both the House and the Senate are moving in this direction.

Let me turn briefly to some of the key successes and future challenges facing the states. Over the past 20 years, state programs have improved to the point that implementation is highly successful. The overall programmatic emphasis under SMCRA has shifted from structural and administrative issues to specific technical issues that are encountered as reclamation technology and science are advanced.

This is where OSM serves a valuable support mechanism for the states, particularly through their TIPS program and the agency's technical training program, both of which undergird the states' efforts to operate efficient and effective programs.

On another front, the states have worked cooperatively with OSM and others to address acid-mine drainage issues through the Acid Drainage Technology Initiative. The states have made significant strides in advancing reforestation efforts on reclaimed lands through the Appalachian Regional Reforestation Initiative. And through a partnership among the states' OSM and EPA we have achieved momentum in the remaining area, where thousands of acres of abandoned mine lands have been restored as part of active mining operations.

Among the future technical and regulatory challenges facing the states are those related to adequate financial assurance for long-term impacts beyond normal reclamation, prime farmland productivity, and underground mine mapping. In each of these instances, and in others, such as subsidence control, blasting, and hydrologic protection, the states are actively engaged in seeking technical solutions, as well as regulatory program enhancements, that will fully and adequately address the concerns associated with these issues.

Much progress has been made over the past 30 years to accomplish the purpose and objectives of SMCRA. At this point in the Act's implementation, we believe that it is most relevant for OSM to focus its energies and resources on assisting and supporting the states through adequate funding for state grants, sound technical assistance, and opportunities for the states to actively participate in the agency's training program. The overall result will be excellence in state program implementation and enhancement of the Federal/state partnership, and better on-the-ground performance by the regulated industry.

Thank you very much.

[The prepared statement of Mr. Conrad follows:]

Statement of Gregory E. Conrad, Executive Director, Interstate Mining Compact Commission

Good morning Mr. Chairman and Members of the Committee. My name is Greg Conrad and I serve as Executive Director of the Interstate Mining Compact Commission. The Compact is comprised of 24 states throughout the country that together produce some 90% of our Nation's coal, as well as important non-fuel minerals. The Compact's purposes are to advance the protection and restoration of land, water and other resources affected by mining through the encouragement of programs in each of the member states that will achieve comparable results in protecting, conserving and improving the usefulness of natural resources and to assist in achieving and maintaining an efficient, productive and economically viable mining industry. Participation in the Compact is gained through the enactment of legislation by the member states authorizing their entry into the Compact and their respective Governors serve as Commissioners. We appreciate the opportunity to participate in this oversight hearing on "A 30th Anniversary Review of the Surface Mining Control and Reclamation Act of 1977". I will present a general overview of the states' experience with SMCRA's implementation and will then turn to my colleagues from West Virginia and Wyoming to provide insights into the operation of state programs in two important coal mining regions of the country. Finally, John Husted of Ohio, who serves as President of the National Association of Abandoned Mine Land Programs, will share the state and tribal perspective on the AML program under SMCRA.

The Surface Mining Control and Reclamation Act is one of several laws passed in the environmental decade of the 1970s that provided for a unique blend of federal and state authority for implementation of its provisions. As one of the original framers of this landmark law, Mr. Chairman, you know that one of its key underpinnings was that the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to the Act should rest with the states, due to the diversity of terrain, climate, biologic, chemical and other physical conditions related to mining operations. We are here to report on our role and experience as primary regulatory authorities under SMCRA.

By almost all accounts, the implementation of SMCRA by the states has been a resounding success. The anticipated purposes of the Act have been or are being accomplished and the overall goal of establishing a nationwide program to protect society and the environment from the adverse effects of past and present surface coal mining operations has been achieved. Drainage and runoff controls are in place to ensure that downstream waters are not filled with sediment or otherwise polluted by mining activity. Blasting operations are controlled to prevent damage to nearby buildings and other property. Final grading and reshaping of mined lands are undertaken to ensure that they are stable and approximate their original contour. Topsoil is preserved and then replaced on mined lands to accomplish high levels of productivity. Mined lands are reclaimed to a variety of beneficial uses within a few years after the completion of mining. Once reclaimed lands are fully bond released, they are returned to local landowners in equal or better condition than before mining began. All of these statutory requirements are being accomplished while maintaining a viable coal mining industry that is essential for meeting our Nation's energy needs. Examples of some of the excellent reclamation that is occurring under the Act can be seen in our two exhibits, which highlight various state, IMCC and OSM reclamation award winners.

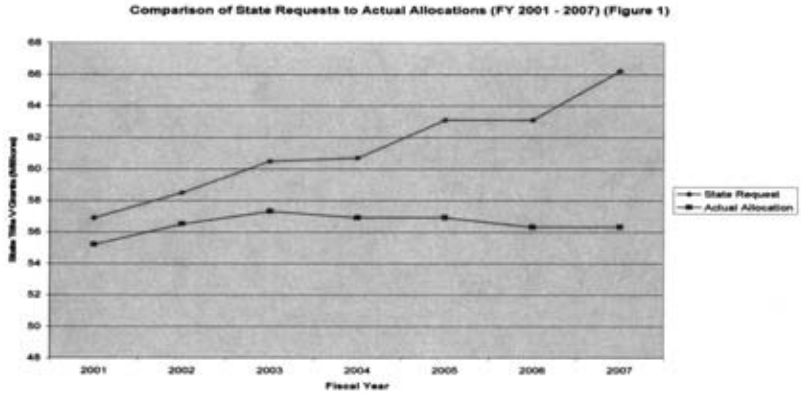
As we reflect back on the past 30 years since the enactment of the Surface Mining Control and Reclamation Act (SMCRA), much has changed and yet some things remain the same. In the early years, we were focused on the development of a comprehensive federal regulatory program that would serve as the baseline for SMCRA's implementation. Many of these initial rules faced legal challenges as being arbitrary, capricious or inconsistent with law and took many years to resolve. A few, like the definition of valid existing rights and the procedural rules concerning ownership and control that underpin the Applicant/Violator System, are still unsettled. However, the majority of the federal rules are in place and working effectively. This is not to say that we are out of the woods with respect to significant future rulemakings. Two examples of rules currently before the Office of Surface Mining, Reclamation and Enforcement (OSM) are stream buffer zones and mine placement of coal combustion by-products, both of which the agency will soon be proposing. However, in general, the regulatory program is more stable and certain than it was even 10 years ago, which benefits both coal operators and citizens.

One of the key components of SMCRA when first enacted was its reliance on a unique and challenging arrangement of state and federal authority to accomplish its

intended purposes and objectives. Pursuant to the state primacy approach embodied in SMCRA, the states serve as the front-line authorities for implementation of the public protection and environmental conservation provisions of the Act, with a supporting oversight role accorded to OSM. It has taken a good portion of the past thirty years to sort out the components of these often competing roles, but the result has been a balance of authority that generally works.

During the past ten or so years, the working relationship between the states and OSM has been particularly productive and non-contentious. We have moved beyond the second-guessing of state decisions that predominated the early years of state program implementation and instead are engaged in more cooperative initiatives where OSM strives to support the states through technical advice and training and where the states and OSM work together to solve difficult policy and legal questions. OSM's oversight program is more focused on results, looking at on-the-ground reclamation success and off-site impacts, which better reflect the true measure of whether the purposes of SMCRA are being met. In fact, over the years, both OSM's oversight program, as well as several state performance-based regulatory programs, have received national recognition for their effectiveness and efficiency.

This is not to say that there are not several challenges ahead of us as we look to the future. Perhaps the most crucial at this juncture is adequate funding for state regulatory programs. Pursuant to section 705 of SMCRA, OSM is authorized to make annual grants to the states of up to 50 percent of the total costs incurred by the states for the purposes of administering and enforcing their programs. This percentage is increased for those states that regulate on federal lands. As you know, Mr. Chairman, these grants are essential to the full and effective operation of state regulatory programs. For the past several fiscal years, the amount for state Title V grants has been flat-lined. (See figure 1) What this graph does not show is that these grants have been stagnant for over 12 years. The appropriation for state Title V grants in FY 1995 was $50.5 million. Essentially, we have attempted to operate effective, high performance programs with a meager $6 million increase spread over 12 years. By most standards, this is remarkable, and clearly a bargain for the federal government. Over this same period of time, coal production has risen substantially and OSM's own budget for federal program costs has increased by over $25 million. Given the fact that it is the states that operate the programs that address the environmental impacts of coal mining operations, a similar increase would have been expected. But instead, state regulatory grants have remained flat-lined.

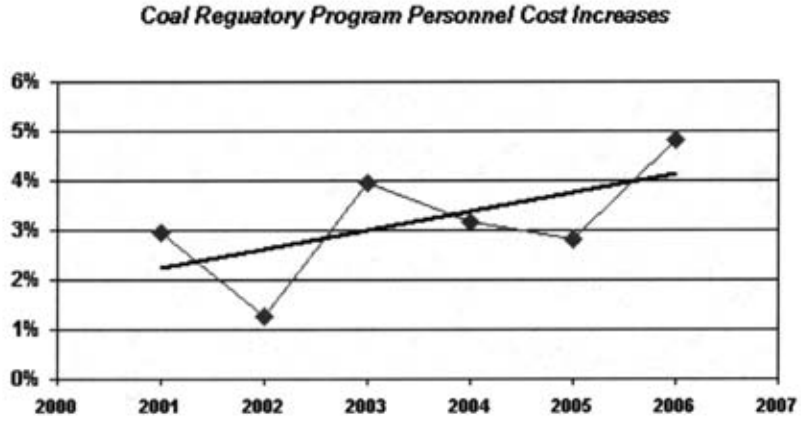


For Fiscal Year 2008, in an attempt to reverse this trend, OSM has proposed a modest increase for state Title V grants. However, it may be too little too late, especially for some states such as Virginia and Utah. In Virginia, for instance, coal production and operating costs have increased, while federal funding for state-based coal regulatory programs has consistently decreased. The rise in costs associated with wages, employee benefits, and transportation fuels have risen approximately 15% over the past four years. Due to the loss of federal funds, Virginia is unable to fill many staff postings, including that of the critical field inspector. Without a full staff of reclamation inspectors, Virginia may not meet federal inspection guidelines. Virginia is also unable to fill technical support staff positions. This will limit the assistance the Commonwealth can offer to coal companies and significantly delay the review and approval process for surface mining permits. Virginia's situa-

tion is symptomatic of what other states are facing—or will soon face—if the debilitating trend for Title V grant funding is not reversed.

It must be kept in mind that state coal regulatory program permitting and inspection workloads are in large part related to coal mine production. In general, as coal production increases, the need for additional permitting and operational inspections also increases. State programs must be adequately funded and staffed to insure that permitting and inspection duties are both thorough and timely as states experience the reality of accelerating coal mine production and expansion activities. As program funding shortfalls continue, states risk the possibility of delayed production and negative impacts to the environment. The situation in Colorado exemplifies this reality. From 2002 to 2006, Colorado production increased approximately 10%. Permit revision activity increased nearly 50% during the same period. This reality has stressed existing program resources and caused the delay or elimination of lower priority program functions.

Just as with the federal government, state regulatory programs are personnel intensive, with salaries and benefits constituting upwards of 80 percent of total program costs. And, just like the federal government, state personnel costs are increasing. (See figure 2) States must have sufficient staff to complete permitting, inspection and enforcement actions needed to protect citizens of the coalfields. When funding falls below program needs, states may struggle to keep active sites free of offsite impacts, reclaim mined areas, and prevent injuries.



Looking again at figure 1, another disturbing trend is evident. The gap between the states' requests, which are based on anticipated expenditures, and what states are receiving in annual grants, is widening. The numbers in this chart are taken from OSM budget justification documents, OSM's website, and estimates provided to OSM from the states. Please note that these numbers have not been adjusted for inflation—which means the situation is actually more bleak. There is no disagreement about the need demonstrated by the states. In fact, in OSM's own budget justification document, OSM states that: "the states have the unique capabilities and knowledge to regulate the lands within their borders. Providing a 50 percent match of Federal funds to primacy States in the form of grants results is the highest benefit and the lowest cost to the Federal government. If a state were to relinquish primacy, OSM would have to hire sufficient numbers and types of Federal employees to implement the program. The cost to the Federal government would be significantly higher." (Page 71 of OSM's Budget Justification)

The enormity of this funding challenge will become increasingly clear as the federal government is faced with the dilemma of either securing the necessary funding for state programs or implementing those programs (or portions thereof) themselves—at significantly higher costs. In Virginia alone, for instance, the cost of OSM running the program would likely amount to $8-10 million based on what it currently costs OSM to run the comparable federal program in Tennessee. For perspective, in Fiscal Year 2007, Virginia has been offered $3.175 million in federal funding to operate its program (although actual needs amount to $3.6 million—an overall shortfall of nearly $1 million when the state match is factored in). If this analysis was expanded to all of the 24 state programs, the overall savings to the federal government would be dramatic. In addition, as anticipated by SMCRA's framers, the

states are closer to the action, are able to account for local conditions and circumstances and can be more responsive.

In the end, the increasing gap between the states' anticipated expenditures and actual Federal funding is compounding the problem caused by inflation and uncontrollable costs, undermines our efforts to realize needed program improvements and enhancements, and jeopardizes our efforts to minimize the impact of coal extraction operations on people and the environment. For all these reasons, we have urged Congress to increase funding for state Title V regulatory grants in OSM's FY 2008 budget to $67 million, as fully documented in the states' estimates for actual program operating costs. A resolution adopted by IMCC at its recent annual meeting addressing this matter is attached to our testimony (Attachment No. 1). At this point, the House has approved an additional $2 million over the Administration's request of $60.2 million and the Senate Appropriations Committee has approved a $6 million increase over that request. This is very encouraging and we trust that in the end, Congress will approve the full $66.2 million for state Title V grants.

It must be kept in mind that where there is inadequate funding to support state programs, some states will be faced with turning all or portions of their programs back to OSM (as in the case of Virginia) or, in other cases, will face potential lawsuits for failing to fulfill mandatory duties in an effective manner (as has occurred in Kentucky and West Virginia in the past). Of course, where a state does, in fact, turn all or part of its Title V program back to OSM (or if OSM forces this issue based on an OSM determination of ineffective state program implementation), the state would be ineligible for Title IV funds to reclaim abandoned mine lands. This would be the height of irony given the recent reauthorization and revitalization of the AML program.

Speaking of the Title IV AML program, the states were greatly encouraged by the passage of the 2006 Amendments to SMCRA, which culminated over 12 years of work by the states and others to reauthorize this vital program. The AML program has been one of the hallmarks of SMCRA and has accomplished much over the years, as you will hear from Mr. Husted. With the infusion of new life and funding, the program holds out great promise for the future. The states have been working closely with OSM to design rules that will appropriately implement the provisions of the 2006 amendments and allow the states to put money into projects that meet the purposes and objectives of the new law. Among the key issues we have addressed in our discussions with OSM are the following:

- Use of the grant mechanism to distribute payments from the U.S. Treasury
- Funding for minimum program states
- Use of unappropriated state share balances for noncoal reclamation and the acid mine drainage set aside
- The effective date of certain payments under the new law
- Adjustments to the current grants process

We look forward to pursuing these issues in greater detail with OSM over the coming months. Should the Committee desire a copy of our more detailed comments on the draft proposed rules, please let us know.

With regard to funding for state Title IV Abandoned Mine Land (AML) program grants, recent Congressional action to reauthorize Title IV of SMCRA has significantly changed the method by which state reclamation grants are funded. Beginning with FY 2008, state Title IV grants are to be funded primarily by permanent appropriations. The only programs that continue to be funded through discretionary appropriations are high-priority federal reclamation programs, state and federal emergency programs, and OSM operations. As a result, the states will receive mandatory funding in FY 2008 of $288.4 million for AML reclamation work. OSM also proposes to continue its support of the Watershed Cooperative Agreement program in the amount of $1.6 million, a program we strongly endorse.

Assuming that permanent appropriations for state AML grants do, in fact, become a reality (and we trust they will), there are three remaining discretionary funding priorities for the states: minimum program funding; federal emergency programs; and Clean Streams funding. With respect to minimum program states, under the new funding formula provided by OSM, all of the states and tribes will receive immediate funding increases except for minimum program states. Under OSM's interpretation of the 2006 Amendments, those programs remain stagnant for the next two fiscal years at $1.5 million, a level of funding that greatly inhibits the ability of these states to accomplish much in the way of substantive AML work. Many of these states have pending high priority AML projects "on the shelf" that cost several million dollars. The challenge for these states is putting together enough moneys to address these larger projects given minimum funding. It is both unfair and inappropriate for these states to have to wait another two years to receive any funding increases when they are the states most in need of AML moneys. We have therefore

urged Congress to fund these states at the statutorily authorized level of $3 million in FY 2008 so as to level the playing field and allow these states to get on with the critical AML projects that await funding.

We have also urged Congress to approve continued funding for emergency programs in those states that have not assumed these programs. Funding the OSM emergency program should be a top priority for OSM's discretionary spending. This funding has allowed OSM to address the unanticipated AML emergencies that inevitably occur each year in states without state-administered emergency programs. Without this funding, it will be up to the states to address the emergencies that occur. In states that have federally-operated emergency programs, the state AML programs are not structured or staffed to move quickly to address these dangers and safeguard the coalfield citizens whose lives and property are threatened by these unforeseen and often debilitating events. Finally, we have urged Congress to approve continued funding for the Clean Streams Initiative. OSM has chosen to eliminate funding for this worthwhile program in FY 2008. We believe this is a mistake. Significant environmental restoration of impacted streams and rivers has been accomplished pursuant to this program, to say nothing of the goodwill that the program has engendered among local communities and watershed groups. For the small investment of money that is appropriated for this program each year (approximately $3 million), the return is huge.

Future challenges for the AML program include the perpetual operation and maintenance costs associated with acid mine drainage treatment; assuring that maximum flexibility is provided to the states to determine their respective AML project priorities; and enhancing opportunities for economic development (including recreation and tourism) in depressed areas of the coalfields.

As mentioned earlier, one of OSM's primary missions under the Surface Mining Act is evaluating the states' administration of their programs, otherwise known as oversight. This process has undergone a significant metamorphosis, the result of which has been a more credible and useful program for informing Congress and others about the status of state program administration. The first attempt at designing a meaningful oversight program in the mid-1980's was merely an exercise in data gathering or output measurement. We were concerned then with numbers of inspections, numbers of permit reviews and numbers of enforcement actions. OSM also tended to look behind state permitting decisions to determine whether OSM would have handled them the same way the states did. This type of "second guessing" generated significant conflict and even resentment between the states and OSM. In addition, the numbers that were collected into oversight reports told us little or nothing about whether the objectives of SMCRA were being met (i.e. what was happening on the ground? how effectively were state programs actually protecting the environment? how well was the public being protected and how effectively were citizens being served? how well were we working together as state and federal governments in implementing the purposes of SMCRA?).

Following an effort by OSM and the states in the late 1980's to fashion a more effective state program evaluation process based on a goal-oriented or results-oriented oversight policy and another review of the process in the mid-1990's, a performance measurement approach was adopted, based in large part on the requirements of the Government Performance and Results Act (GPRA). The new outcome indicators now focus on the following: the percentage of coal mining sites free of offsite impacts; the percentage of mined acreage that is reclaimed (i.e. that meets the bond release requirements for the various phases of reclamation); and the number of federal, private and tribal land and surface water acres reclaimed or mitigated from the effects of natural resource degradation from past coal mining, including stream restoration, water quality improvement, and correction of conditions threatening public health or safety. These new measurements are intended to provide Congress and others with a better picture of how well SMCRA is working and how well the states are doing in protecting the public and the environment pursuant to their federally approved programs. Much of this can also be told in pictures of reclaimed mined areas like those shown in our exhibits, many of which reflect winners of IMCC's and OSM's national reclamation awards. Effective program implementation by the states and compliance by the coal industry are resulting in the reclamation and restoration of both active and abandoned sites that meet the objectives of SMCRA and benefit both people and the environment.

Over the past twenty years, state regulatory programs have improved to the point that implementation is highly successful. Due to this success, the overall programmatic emphasis under SMCRA has shifted from structural and administrative issues to specific technical issues that are encountered as reclamation technology and science are advanced. These issues tend to manifest themselves as environmental challenges unique to particular regions or states, many of which must be re-

solved during the permitting process. They may also arise as a result of state inspections at mining sites. In any event, due to constraints on existing state resources, states may be unable to undertake the type of technical analyses that attend these issues. This is where OSM serves a valuable support mechanism for the states (as anticipated by Section 705 of SMCRA) by providing technical assistance. In addition to meaningful and properly focused assistance, the states also look to OSM's Technical Innovation and Professional Services (TIPS) program. This has been one of OSM's most valuable and effective initiatives and serves as the cornerstone of the states' computer capability, particularly now that many states are utilizing electronic permitting. We trust that OSM and Congress will continue their support for TIPS and for the hardware and software upgrades that are required to assure the system's integrity and usefulness. TIPS training is also critical.

One of the key successes of SMCRA over the years has been its training program. Through a combination of both state and federal agency instructors, OSM's National Technical Training Program (NTTP) assures that newly hired state and federal employees, especially inspectors and permit writers, receive adequate and credible training both on basic elements of program implementation and on cutting-edge technical and policy subjects. The NTTP has also allowed more seasoned employees to fine tune their skills and update their knowledge on important topics. OSM's training program is especially important for smaller states that do not otherwise have access to such resources. In addition to NTTP classes, IMCC (working in cooperation with NTTP) has developed and facilitated a series of benchmarking workshops for both state and federal agency personnel that has allowed them to improve and enhance their respective regulatory programs and skills in such areas as blasting, subsidence, bonding, underground mine mapping, and permitting related to hydrologic balance. OSM has also sponsored several interactive forums on a variety of subjects of mutual interest to the states and we urge the agency to continue this practice, again with state input. All of these training components will become increasingly more critical as OSM and the states face a retiring workforce and the attendant succession planning that follows.

There have been other notable successes in SMCRA's implementation, in both the regulatory and policy areas. The states have worked cooperatively with OSM and others to address acid mine drainage issues through the Acid Drainage Technology Initiative, which focuses on prediction, prevention, avoidance, remediation and treatment. Again working cooperatively with OSM, the states have made significant strides in advancing reforestation efforts on reclaimed lands, particularly through the Appalachian Regional Reforestation Initiative. Through a partnership among the states, OSM and the Environmental Protection Agency (EPA), we have also seen major strides in the remining arena, where thousands of acres of abandoned mine lands have been restored as part of active mining operations, thereby saving valuable AML Trust Fund dollars and returning the land to productive use. We have also been working with EPA and OSM to revisit the current effluent limitation for manganese so as to reduce or prevent the adverse effects and potential hazards arising from some of the treatment technologies related to control of manganese.

In its 1990 monograph on "Environmental Regulation of Coal Mining: SMCRA's Second Decade", the Environmental Policy Institute identified and commented on several challenges facing the states and OSM, as follows:

> The issues facing regulators today are more difficult than they were in 1977. Many of the easier and more blatant problems have been addressed [such as the two acre exemption]....The regulatory issues today include the prevention of hydrologic damage, the control of subsidence and subsidence damage, the establishment of adequate reclamation bond amounts, the use of permit-based enforcement, and the improvement of federal oversight. Also of concern is the massive shortfall in the federal fund meant to reclaim areas abandoned prior to 1977 without reclamation. [Page3]

Throughout SMCRA's third decade, many of these issues have been addressed and resolved. Congress has addressed the shortfall of moneys in the AML Trust Fund with the 2006 Amendments to SMCRA and OSM and the states are well on their way to implementing those adjustments and putting more money on the ground to restore AML sites. Federal oversight (and the attendant state/federal relationship under SMCRA) has advanced by significant degrees and is no longer the flashpoint that it once was. Through advances in electronic permitting and the use of tools available through OSM's TIPS program, state permitting actions are timely, comprehensive and accurate, thereby insuring more effective compliance with the law.

That being said, given the nature and scope of today's mining and reclamation operations and attendant environmental impacts, we continue to face challenges as regulatory authorities under SMCRA. A few examples follow:

- Bonding—one of the larger challenges concerning the bonding provisions of SMCRA is with regard to post closure issues. While SMCRA originally envisioned the bond as a guarantee of performance during mining, it did not anticipate the challenges associated with postmining concerns such as long-term treatment associated with acid mine drainage or long-term impacts from subsidence. For instance, OSM's current rules on bonding require that the bond amount be adjusted for potential subsidence damage repairs. However, nothing is said about how the bond release procedure will apply in these situations. The result is that surety companies are reluctant to write bonds for reclamation because of the long term nature and unknown extent of the liability. The states have been working with OSM to address this matter through the use of other financial assurance mechanisms, such as trust funds. There are also issues associated with bond release in general. Given that the procedures attending release are so cumbersome and expensive, coal operators simply choose not to apply for them. This further impacts the availability of bond capacity in the market and results in unnecessary expenses for states related to continued inspection and enforcement on these essentially completed reclamation sites.
- Prime farmland—the requirements related to proof of productivity (five year minimum) prior to termination of jurisdiction and before the land can be returned to the owner are cumbersome. The mid-continent states are currently undertaking research through a major Midwestern agronomy/soil science university to determine proper testing techniques to ensure soil capabilities are present, in the hope that an alternative method for demonstrating productivity can be attained, thus returning land much sooner back to the owner of record.
- AVS—over the past twenty years, the states have worked diligently with OSM to develop the Applicant/Violator System (AVS), which assists us in implementing section 510(c) of SMCRA, particularly the issuance of permits. Early in the development of AVS, the states focused on designing a system that would allow them to identify and block violators and other scofflaws without bogging down the database with useless or unproductive information. While we have made progress in this regard, we continue to examine ways to improve and enhance overall system effectiveness. For example, a critical aspect of AVS is the rules that define ownership and control; permit and application information requirements; and the transfer, assignment or sale of permit rights. These rules have been under a constant state of flux since their original promulgation in 1988 and a recent OSM rulemaking attempts to bring closure to several key issues that remain unresolved or problematic.
- Underground mine mapping—another continuing challenge that we face concerns accurate and readily available underground mine maps, which are essential for protecting the public, the environment and infrastructure from the threats posed by unknown underground mines. Events such as the Quecreek incident in Pennsylvania and the Martin County Coal Company impoundment failure in Kentucky were high profile demonstrations of the kinds of incidents that can occur when mine maps are inaccurate or unavailable. IMCC has sponsored a series of national and regional benchmarking workshops that have focused on the collection, handling, scanning, georeferencing and validation of mine maps. While the expertise and technology is available to tackle this issue and accomplish these tasks, our biggest challenge is the lack of funding for personnel, hardware, software upgrades and database development to move the initiative forward.

In each of these instances, and in others such as subsidence control, blasting and hydrologic protection, the states are actively engaged in seeking technical solutions, as well as regulatory program enhancements, that will fully and adequately address concerns associated with these issues. As an example, over the past several years, IMCC has sponsored benchmarking workshops on subsidence impacts, blasting, financial assurance, electronic permitting and hydrologic balance, all of which have provided state and federal regulators with an opportunity to examine these issues in detail with an eye toward regulatory program improvements. IMCC is currently preparing for its next workshop on surface and ground water database development and use as part of the permitting process. The overall goal is to continually assess and enhance our performance as regulatory authorities in an effort to achieve ever higher levels of program effectiveness.

Much progress has been made over the past 30 years to accomplish the purposes and objectives of SMCRA. From our perspective, the basic organization of OSM is working well. At this point of SMCRA's implementation, neither the states nor OSM are dealing with the same types of issues or problems that attended the early years of program formation and administration. We have moved away from questions of adequate state program components and state implementation techniques to more

substantive issues associated with technical, on-the-ground problems or with thorny legal and policy questions associated with interpretation of our programs. We therefore believe that it is most relevant for OSM to focus its energies and resources on assisting and supporting the states through adequate funding for state grants, sound technical and legal assistance, and opportunities for the states to actively participate in the agency's excellent training program. The overall result will be less federal intrusion in the states' administration of their programs, a concomitant enhancement of the federal/state partnership, and better on-the-ground performance by the regulated industry.

We appreciate the opportunity to present this testimony today and welcome the opportunity to work with your Committee, Mr. Chairman, to insure the effective implementation of SMCRA in the 21st century.

ATTACHMENT NO. 1

Resolution
interstate mining compact commission

BE IT KNOWN THAT:

WHEREAS, the Surface Mining Control and Reclamation Act (SMCRA) provides for the assumption of authority by state governments to regulate surface coal mining and reclamation operations within their borders following approval by the federal Office of Surface Mining (OSM) of state programs; and

WHEREAS, section 705 of SMCRA requires the federal government to provide annual grants up to 50 percent for costs incurred by the states for the purpose of administering and enforcing their approved regulatory programs; and

WHEREAS, over the past 25 years the states have been led to believe, based on actual practice and OSM policy, that the federal government would base annual grants on the states' estimated costs for implementing their regulatory programs, pursuant to the principles of primacy and partnership embedded in SMCRA; and

WHEREAS, in recent years federal funding for state regulatory grants has stagnated, resulting in a $10 million gap between the states' estimated program costs and actual grant funding; and

WHEREAS, this debilitating funding trend is severely impacting the states' ability to run efficient and effective regulatory programs that meet the purposes and objectives of SMCRA, with some states having to overmatch federal grants dollars and other states being forced to seriously consider turning all or portions of their programs back to the federal government; and

WHEREAS, the costs for the federal government to operate regulatory programs in primacy states will, by OSM's own admission, be significantly higher than what the states currently spend; and

WHEREAS, there is strong, widespread support for increases in state regulatory grants from both the regulated industry and citizen groups so as to preserve the quality and integrity of state programs;

NOW THEREFORE BE IT RESOLVED:

That the Interstate Mining Compact Commission (IMCC) strongly urges Congress, the Office of Management and Budget, the Department of the Interior and OSM to shore up and support state regulatory programs through full funding of state grants so that states can effectively meet the objectives and mandates of SMCRA; and

BE IT FURTHER RESOLVED:

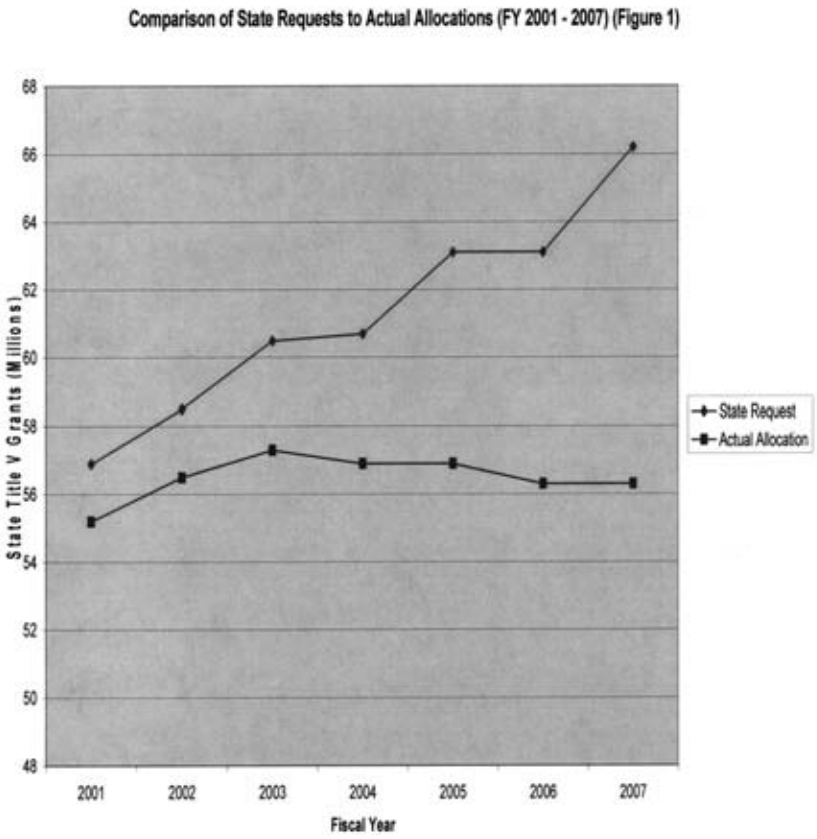
That IMCC specifically requests that funding for state regulatory grants in OSM's proposed FY 2008 budget be increased by $7 million for a total of $67 million.

Issued this 2nd day of May, 2007

ATTEST:

_____
Executive Director

Figure No. 1



July 31, 2007

The Honorable Nick J. Rahall II
Chairman
Committee on Natural Resources
U.S. House of Representatives
Room 1324 LHOB
Washington, DC 20515

Dear Mr. Chairman:

DurIng the course of an oversight hearing on the 30th Anniversary of the Surface Mining Control and Reclamation Act (SMCRA) on July 25, several allegations were leveled at the States of Virginia, Indiana and Illinois concerning implementation of various aspects of their regulatory programs. You specifically requested that I follow up on a situation in Virginia where a citizen had filed a complaint against A and G Coal Company for mining without a permit. There were also allegations concerning groundwater protection standards and adequate public participation in the states of Indiana and Illinois. I contacted each of these states and they have provided the following information regarding the allegations raised during the hearing.

Virginia—in his testimony, Mr. Walt Morris alleged that "the state regulatory authority in Virginia continues to refuse to investigate citizen allegations that a coal operator is conducting mining operations without a permit—on the incredible theory that the state has no obligation to inspect because it has not issued a permit for the mine." Mr. Morris went on to allege that "OSM's Virginia field office continues to ignore a citizen request for inspection and enforcement in the same matter, even

though the time for responding under OSM's regulations has long since expired." Since the hearing on July 25, Mr. Morris has sent a formal apology to OSM's Virginia field office indicating that, indeed, a timely response by OSM to the citizen request for inspection and enforcement had been made. What he fails to mention is that OSM also found that Virginia's response to a Federal Ten Day Notice regarding the matter was appropriate and that Virginia has "shown good cause for not taking enforcement actions in this case." As indicated in the attached documents, it is very clear that all of the activity at the alleged mining site was related to logging operations, oil and gas well development activity and two completed and fully reclaimed coal exploration sites. Because of his lack of first hand knowledge concerning the situation at the site, Mr. Morris misled the Committee concerning activity at the site, the citizen complaint, and Virginia's and OSM's handling of the complaint. Mr. Morris also impugned the integrity of the Virginia program and its handling of this matter. The Virginia Department of Mines, Minerals and Energy makes extraordinary efforts to work with and assist its citizens and has received national recognition for those efforts. Unfounded allegations such as those leveled by Mr. Morris do little to support the excellent work being done by the states under SMCRA. We believe that he not only owes OSM an apology, but the Commonwealth of Virginia as well.

Indiana—in his testimony, Mr. Brian Wright made several inaccurate and misleading statements regarding the Indiana regulatory program, particularly with respect to protection of groundwater resources and mine placement of coal combustion wastes. An explanation from the state of Indiana addressing these matters is attached to this letter.

Illinois—in his statement, Mr. Wright also mischaracterized or made false accusations regarding several aspects of the Illinois program, including groundwater protection standards, longwall mining and subsidence protection requirements, lands unsuitable petitions and citizen participation. An explanation from the state of Illinois addressing each of these matters is attached.

Pennsylvania—Mr. Wright also mentioned that the Commonwealth of Pennsylvania is preparing a report on coal combustion waste. To clarify, no such report is in the works. What Pennsylvania is developing are updated and expanded policy guidelines regarding mine placement of coal combustion waste in light of the NRC report. Once prepared, these guidelines will be available for public review and comment.

Thank you for the opportunity to address and clarify these inaccuracies, misrepresentations and allegations. Many of them are very serious and we trust that the record will reflect the corrections and explanations offered by the states. Should you have any questions or require additional information, please do not hesitate to contact me. And once again, our sincere appreciation for holding the oversight hearing and for the opportunity to participate.

Sincerely,

Gregory E. Conrad
Executive Director

Attachments

The Indiana Department of Natural Resources, Division of Reclamation (DOR) is the regulatory authority for coal mining in the State of Indiana. We take issue with the manner in which our program was mischaracterized in the testimony of the Hoosier Environmental Council on July 25, 2007 before the House Natural Resources Committee concerning the implementation of the Surface Mining Control and Reclamation Act of 1977. The testimony contained inaccuracies concerning Indiana's coal regulatory program and its alleged lack of adequate protection for groundwater resources and the public, along with other misconceptions. We appreciate the opportunity to clarify these matters.

Staff of the DoR include hydrogeologists with decades of experience in coal mine regulation. Not only do regulations contain numerous and extensive hydrology related requirements but, as will be discussed below, the State of Indiana has a groundwater standards rule which has been implemented within Indiana's surface coal mining regulations. Contrary to some testimony, the DoR's regulatory framework and implementation of the surface coal mining regulations does provide adequate protection and safeguards to citizenry and the environment living in and near the coalfields of Indiana.

As discussed in the Hoosier Environmental Council testimony, regulations require that coal mines minimize disturbance of the hydrologic balance within the permit

and adjacent areas, prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved post mining land uses, 30 CFR 816.41. It was stated these regulations have been applied inadequately to protect the water of coalfield residents. In actuality, the groundwater standards regulations within Indiana's surface coal mining regulations were developed and implemented on the precise premise that requires the state to follow the federal law and regulations as it pertains to minimizing impacts within the permit area and preventing material damage outside the permit area. Coal mining operations must implement groundwater protection measures including proper handling, treatment, and disposal of any coal refuse and any acid and/or toxic forming earthen materials. Further, specific protective measures are employed such as proper sealing of boreholes, auger holes, etc....,as well as special handling provisions to prevent formation of acid mine drainage (measures to minimize disturbance of the hydrologic balance within the permit and adjacent areas) and to ensure that mineralization of the water which recharges within the spoil mass does not migrate off-site and adversely impact residential wells or groundwater resources (prevent material damage to the hydrologic balance outside the permit area).

Indiana's groundwater standards were developed by the Water Pollution Control Board of the Indiana Department of Environmental Management as a part of a public process including a workgroup made up of academia, industries, the public, environmental groups, and state regulatory personnel. An outcome of that regulation was a requirement that other state regulatory authorities would develop regulations within their frameworks to implement the groundwater standards. That is exactly what the DoR did with the groundwater standards promulgated for ensuring protection at coal mine sites. The surface coal mining regulations were developed with input from the Indiana Department of Environmental Management who endorsed the final regulations (see report at end). It should be noted that the groundwater standards are state regulations above and beyond the federal Surface Mining Control and Reclamation Act (SMCRA). Federal SMCRA regulations do not contain specific groundwater standards. Rather, the states develop and implement groundwater standards by choice. Indiana chose to provide protections, beyond that required within federal SMCRA, to groundwater resources and groundwater users by not only ensuring compliance with federal SMCRA but also to provide additional protections through state groundwater standards regulation. An Informational Bulletin, adopted in May 2003, explaining the rationale behind this regulation follows the narrative at the end of this document. Both of these were approved at a public meeting by the DoR's ultimate state authority, the Natural Resources Commission. The public testimony at this meeting is included following the policy document.

Another inaccuracy to the testimony is the claim that Indiana does not characterize pre-mine hydrologic conditions. Each application for a mining permit contains groundwater quantity and quality information gathered over many months in order to characterize any seasonal variation. Moreover, aquifer testing (contrary to the claims in the written testimony) is conducted to determine hydraulic characteristics such as permeability and rate of flow. Groundwater availability in the coal region of Indiana is typically very low with exception of those areas along major river systems. The rock overlying the coal is simply not conducive to large amounts of water movement and thus the pits during mining are most often quite dry. For this reason, the citizens using water wells typically drill them to depths ranging up to 300 feet and normally much deeper than the lowest coal seam to be mined by surface mining techniques. The reason citizens construct wells in this fashion is due to the lack of a reliable, shallow groundwater source, thus they take advantage of a deep well with adequate storage capacity. Monitoring well installations for the purpose of monitoring aquifer characteristics (both quantity and quality) are developed in a similar fashion. Should wells in an area be developed in a single geologic unit then monitoring wells are installed in a single unit. But, typically monitoring wells are constructed over the entire bedrock interval due to the fact that is the manner most citizen wells are installed.

Indiana's surface mining regulations require the replacement of the water supply in the unlikely event of interruption or adverse effects to a user of groundwater. Replacement can occur by many methods including hook ups to a municipal water supply, drilling a new well, or any other method acceptable that will provide an equivalent water delivery system. The permittee of the mining operation must also provide payment of operational and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

Hoosier Environmental Council testimony also indicates that Indiana rules eliminate any incentive to minimize impacts to groundwater quality. Indiana's statute and regulations provide numerous hydrology related operational and performance

standards that must be adhered to or face enforcement action and potential permit revocation and exclusion from future mining nationally which is certainly incentive to comply.

One area of agreement with the Hoosier Environmental Council testimony is in regard to the statement that "It would be unrealistic to assume ground water in mined areas will remain in pristine condition". As was mentioned by an industry representative in the oral testimony, the mineralization of groundwater is an unavoidable result of any surface mining due to the breaking of rock and the additional surface area available for groundwater to contact. These constituents were present in the rock prior to mining. It would be unrealistic to place a qualitative, numeric standard within the spoil or refuse areas and regulate a coal mine operator with unreasonable or potentially unattainable expectations. A mine operator can comply fully with all aspects of law and regulation and mineralization of groundwater will still occur. To what extent is dependent on conditions beyond the control of the mine operator. For that reason, the rule writers of SMCRA thirty years ago set forth regulations calling for minimization within the mined area and prevention of material damage beyond. We believe these provisions were put in place by a group of very wise individuals with great understanding of groundwater issues related to coal mining. Indiana's regulations, both for coal mining and groundwater standards concerning coal mines, are based on this exact premise and do provide adequate protection to the citizens and the environment of the coal region of Indiana.

Another issue Indiana wishes to clarify is that of the volume of coal combustion wastes permitted for disposal as described by the Hoosier Environmental Council testimony. It was stated that 125 million tons of coal combustion waste has been approved for disposal in Indiana mines. This figure has been frequently misrepresented. In reality, numerous coal combustion waste disposal applications contain a request to dispose of the same waste from the same generator. Sometimes a part of the bidding for a coal contract with a major utility contains a provision to return a quantity of coal combustion waste to the mine site. Numerous applications contained a request to dispose the same material. This has been explained many times to the Hoosier Environmental Council and others, but the Hoosier Environmental Council continues to misrepresent the actual amount of material that could be disposed or has been disposed. The State of Indiana generates 5 to 7 million tons of coal combustion waste annually. Disposal at coal mines has been permissible since 1988. In that 19 years period the State of Indiana has produced well over 100 million tons while less than 9 million tons has actually been disposed at Indiana coal mines.

NATURAL RESOURCES COMMISSION

Information Bulletin #38 (First Amendment)

SUBJECT: Implementation of the Indiana Ground Water Quality Standards at Coal Mines Regulated under IC 14-34

I. HISTORY

A technical amendment is made to this information bulletin adding the Indiana Register publication citation for LSA Document #02-104(F) to facilitate historical research of amendments to 312 IAC 25. This document supersedes Information Bulletin #38 published at 27 IR 1665.

II. PURPOSE

The purpose of this nonrule policy is to provide guidance and added explanation of rules adopted by the Natural Resources Commission for implementation by the Department of Natural Resources, Division of Reclamation. These rules were given final adoption by the Commission on May 20, 2003, as amendments to 312 IAC 25 and are more particularly described as Legislative Services Document #02-104(F) (26 IR 3860). They help implement the Indiana ground water standards established through the rules adopted by the Water Pollution Control Board that became effective March 6, 2002.

As required by IC 13-18-17-5, an agency with jurisdiction over an activity must adopt rules to apply the ground water quality standards adopted by the Water Pollution Control Board. As described in 327 IAC 2-11-2(b), when adopting rules an agency shall "...ensure that facilities, practices, and activities are designed and managed to eliminate or minimize, to the extent feasible, potential adverse impacts to the existing ground water quality by applying preventative action levels, design standards, a monitoring framework, or other regulatory methods." The amendments to 312 IAC 25 were developed in this context.

The amendments to 312 IAC 25 assist in the implementation of IC 14-34 (the Indiana Surface Mining Control and Reclamation Act or "Indiana SMCRA") governing surface coal mining and reclamation activities. The rules contain criteria for ground water classification, monitoring, and compliance that apply at sites regulated under Indiana SMCRA. This information bulletin has been developed to provide information concerning procedures and issues regarding the implementation of the rule amendments.

The following sections include a discussion of the background for the rulemaking, a section that describes the mines and associated activities that are subject to the rules, ground water classification, standards to be met, the establishment of a ground water management zone (or "GMZ"), the location at which the standards must be met, requirements for additional monitoring wells to serve as early detection wells, and the plans or actions that must occur if a standard is exceeded.

III. REGULATORY FRAMEWORK

The rules and their interpretations were developed within the context of existing state and federal mandates concerning coal mining. The existing program requires compliance with state water quality standards (IC 14-34-10-2(13), 312 IAC 25-6-12(c), and 312 IAC 25-6-76(c)). Coal mine operations are required to minimize disturbances to the prevailing hydrologic balance on the mine site and associated off site areas (IC 14-34-10-2(13)). Further, surface and underground coal mining activities must be planned, conducted, and designed to minimize changes to the prevailing hydrologic balance in the permit area and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, in order to prevent long term adverse changes in that balance that could result from those activities (312 IAC 25-6-12(a) and 312 IAC 25-6-76(a)). It is clear that this language recognizes the possibility of impacts beyond the permitted area. It is also clear that any such impacts, should they occur, must be minimized and must not materially damage the hydrologic balance outside the permit boundaries.

Indiana SMCRA and rules developed under Indiana SMCRA recognize the potential for impacts to occur beyond the permit area or to uncontrolled properties within the permit area. Existing standards already require replacement of any water supply when used for any legitimate purpose is diminished, contaminated, or interrupted by mining activities. The rules do not grant anyone a right to cause impacts to adjacent or uncontrolled properties. Rather, Indiana SMCRA and rules developed under Indiana SMCRA recognize that a permittee may follow its approved plan, comply with all legal mandates, conduct operations in accordance with best management practices, and yet still have an impact on ground water off-site. Wide-scale off-site impacts in Indiana are very uncommon and, consequently, the rule amendments are not being developed to correct a problem. The rule amendments require that a specific standard be met at a specific distance or location.

Although impacts to water wells off the permitted area do occasionally occur, existing standards at 312 IAC 25-4-33, 312 IAC 25-4-78, 312 IAC 25-6-25, and 312 IAC 25-6-88 adequately address these problems. When an impact does occur, an alternate source of water is provided by the permittee. Moreover, the rule amendments in LSA Document #02-104(F) (26 IR 3860) do not impart a permittee with any additional rights to intentionally or unintentionally cause impacts to adjacent areas and uncontrolled properties. The rights of property owners to take action against a permittee as a result of an impact to their property, beyond requirements imposed by these rule amendments, remain unaffected.

Indiana Register Date: Jul 26,2007 2:24:30PM EDT DIN: 20061011-IR-312060445NRA Page 1

IV. APPLICABILITY

The rule amendments apply to coal extraction areas where surface and underground coal mining and reclamation permits are issued under Indiana SMCRA. For the purposes of the rule amendments, coal extraction areas include augering, coal processing, coal processing waste disposal, spoil deposition, or underground development waste deposition that occurs after the effective date of the amendments or on which a disposal activity subject to IC 13-19-3-3 has occurred and the area is not fully released from the performance bond required by IC 14-34-6.

V. GROUND WATER CLASSIFICATION

Ground water must be classified according to 327 IAC 2-11-4 to determine the appropriate narrative and numeric criteria and level of protection that applies to the ground water. The classification of the ground water at the boundary of the GMZ is drinking water class unless it has been classified as limited class ground water or impaired class drinking water by 327 IAC 2-11. It should be noted, the limited class ground water classified according to 327 IAC 2-11-4(d) must meet the require-

ments found at 327 IAC 2-11-7(b), which include only the constituent concentrations attributable to coal mining, not those associated with the disposal of coal combustion waste. See 327 IAC 2-11-5 through 327 IAC 2-11-8 for further information on the criteria for all ground water, drinking water class ground water, limited class ground water, and impaired drinking water class ground water.

Should a permittee wish to propose a reclassification of ground water, the IDEM Ground Water Section should be contacted to discuss the IDEM procedures, specific information requirements, and the criteria for limited class ground water and impaired drinking water class ground water.

VI. STANDARDS

Surface and underground coal mining and reclamation operations must be planned and conducted to prevent violations of the ground water quality standards found in 327 IAC 2-11. Mining and reclamation operations are to be performed to minimize the effects of mining and reclamation on the hydrologic balance in the permit area and adjacent areas and to prevent material damage to the hydrologic balance outside the permit area. Once the ground water has been classified, the monitoring framework has been established, and a plan has been included in the permit application to indicate the location the standards will be met, a demonstration including the measures that will be taken to ensure the protection of the hydrologic balance is to be made.

The standards found in 327 IAC 2-11 are point specific. The rules require that a specific standard be met at a specific distance or location. An exceedance at one point, even if that point is outside the permitted area, may not constitute material damage to the hydrologic balance, a concept that by definition at 312 IAC 25-1-67 involves a hydrologic system existing in an area. Both the rules and this information bulletin have been developed in this context.

VII. GROUND WATER MANAGEMENT ZONE (the "GMZ")

The point of compliance in 327 IAC 2-11 is the boundary of the ground water management zone ("GMZ"). The standards established by 327 IAC 2-11 must be met at and beyond the GMZ as established in 312 IAC 25-6-12.5(d) and 312 IAC 25-6-76.5(d). The boundary of the GMZ will be established during initial permit review and may be modified in response to changes in operations plans or alterations of permit boundaries throughout the life of the mine. Ground water monitoring plans included in the permit application will provide the manner in which water quality at the GMZ boundary will be measured. The location of the boundary of the GMZ will be based on the location of drinking water wells or a distance from mining related activities identified in subdivision (1) of 312 IAC 25-6-12.5(d) or 312 IAC 25-6-76.5(d) of the rules. In general, the GMZ boundary will be established three hundred (300) feet from the edge of:

(1) coal extraction areas;
(2) coal mine processing waste disposal sites if not within coal extraction areas;
(3) areas where coal is extracted by auger mining methods;
(4) locations at which coal is crushed, washed, screened, stored, and loaded at or near the mine site unless the locations are within the coal extraction areas; or
(5) spoil deposition areas.

An exception to this condition will occur when the permit boundary or the extent of property controlled by the permittee is located at a distance less than three hundred (300) feet from areas requiring a GMZ. While the standards will apply at the boundary of the GMZ, ground water monitoring wells will be required at locations within the control of the mining company that are within the GMZ (i.e., less than 300 feet from the mining activities that define the GMZ). To minimize confusion, DOR will refer to those wells established within the GMZ as "interception wells." Likewise, in the event a drinking water well is located within three hundred (300) feet of areas requiring a GMZ, and there is a likelihood of impact, a monitoring well (interception well) may be required between the drinking water well or wells and the activities that define the GMZ.

Indiana Register Date: Jul 26, 2007 2:24:30PM EDT DIN: 20061011-IR-312060445NRA Page 2

For underground mines, the GMZ boundary will normally be established at a distance of three hundred (300) feet from the edge of the area containing the surface effects of the mining operation. These include:

(1) coal mine processing waste disposal sites;
(2) locations at which coal is crushed, washed, screened, stored, and loaded at or near the mine site; or
(3) underground development waste and spoil deposition areas.

As with the surface mines, a monitoring well will be required within the GMZ when the GMZ boundary falls on uncontrolled properties. When coal refuse is disposed in the underground works, the GMZ boundary will be modified to incorporate any area in which this activity occurred.

Posted: 10/11/2006 by Legislative Services Agency
An html version of this document.
Indiana Register Date: Jul 26,2007 2:24:30PM EDT DIN: 20061011-IR-312060445NRA Page 3

Consideration of Recommendation of Hearing Officer to the Natural Resources Commission with Report of Public Hearing and Written Public Comments, Responses by the Division of Reclamation, and Presentation for Final Adoption of SMCRA Water Quality Amendments (312 IAC 25) to Implement 327 IAC 2; Administrative Cause Number 02-160L (LSA #02-104(F))

Stephen Lucas, Hearing Officer, introduced this item. He explained that this was a proposition for an important set of rule proposals. "I think they are all important, but this one is perhaps more noteworthy than some and drew more attention than some." Lucas stated that, as Hearing Officer, he did not make certain recommendations, but the "parties did a particularly good of expressing their perspectives and providing important information on the rule proposal. I do want to publicly thank those who participated in the very helpful way in which they worked with me as the hearing officer. This is the kind of issue that could be very difficult and unpleasant, because feelings are sometimes are very strong. But in this instance the staff, the public, and the regulated community were extremely helpful in delineating this report." Lucas then deferred to Marvin Ellis of the Division of Reclamation.

Marvin Ellis, Hydro-geologist in the Technical Services Section of the Division of Reclamation, addressed the Commission. Ellis explained that the rules would amend 312 IAC 25, the Indiana Surface Mining Control and Reclamation Act. Ellis stated that the rule amendments implement the ground water quality standards established by IDEM's Water Pollution Control Board and include classification criteria for ground water, numeric standards and narrative criteria that must be met, and ground water management zones.

Ellis explained that the Indiana coal mining and land reclamation programs already include extensive groundwater protection measures, and said that they are being updated to incorporate these added provisions. He said the amendments do not replace existing program criteria, but further define and strengthen the coal and land restoration programs for the citizens of the State of Indiana. Ellis said that the proposed rule is based upon the IDEM rule which became effective March 6, 2002. He explained that the rule applies the IDEM groundwater classification scheme and numeric standards. The rule also establishes a management zone with specific compliance points from a mining activity based upon default criteria within the IDEM rule. Ellis reported that Division of Reclamation staff met with staff of IDEM's Office of Water Quality Drinking Water Branch on several occasions to ensure they were applying the rule consistent with the intent of the statute. "We wish to express our appreciation to the staff of IDEM who have provided us valuable input while drafting this rule." Ellis said that the Division of Reclamation also met with the Hoosier Environmental Council and coal industry regarding the rule and extended appreciation for their input and "well thought out written comments throughout the public comment period."

Ellis explained that in response to written comments provided by members of the public, the Hoosier Environmental Council, the Indiana Coal Council, and other organizations, the rule amendments have been revised to reflect many of the suggestions. He said that the Department responses to all comments were included in the report provided by the Hearings Officer.

Ellis noted that in addition to the proposed rule, the Division of Reclamation also developed a nonrule policy for the implementation of the ground water quality standards at mines. He said that the purpose of the nonrule policy was to provide support guidance and added explanation of the proposed rule. He informed that the nonrule policy document contains a discussion of the ground water management zone and how its location is determined. The policy document also addresses the installation of monitoring wells, termed interception wells, that will be located between the mining activities and drinking water wells or property boundaries, for the purposes of early detection and added level of protection. In order to assist in understanding the rule and the policy Ellis provided a visual aid that depicted an example for the establishment of the groundwater management zone and the locations at which monitoring would occur.

Ellis thanked the Commission for their consideration of the proposed rule, package and non-rule policy document.

Ray McCormick said, "In the example you give here, we have one contiguous block of land that is represented by the permitted area. However, in my area, the tunnels and the mine areas extend out for five miles in different directions, and it's a matrix of people that are leased at that particular coal company. There are some that are leased at different coal companies, and some that are not leased. McCormick referenced the example map and asked whether the permitted area and each one of the farmsteads would be monitored or well identified out to the 300-foot zone from each of the 40-acre tracts or 100-acre tracts that occur underground from the center of the mine.

Ellis said, "When you get out in the areas that are leased and they are mining deep underground, we refer to that often times as shadow acres.—He explained that in the permitting process the applicant has to identify all the groundwater users that are within the surface effect area and within the shadow area, whether it's a 1,000-acre shadow area or multi-thousand acre shadow area. Ellis explained that the process can identify owners, their uses and a sampling occurs as part of the establishment for base-line purposes prior to issuance within the permit area.

McCormick continued, "So you're saying that this example is for activities above surface and during low ground water, but for areas outside of the surface activity, these standards do not really apply?"

Ellis said the standard would apply at the drinking water wells, but the management zone is going to be drawn based on the proposed activities. "Focus is on surface effects area. That is where the management zone will initially be drawn." However, "depending on the nature activity if there are some waste returned to the underground works, then that would influence its location." He said sampling occurs throughout the entire permit process for baseline purposes, prior to permit issuance and also later when the active mining operations are occurring. Ehret interjected that the Department treats surface and underground mines differently, because of the "nature of problems are somewhat different. Historically, if we have problems in proximity to underground mine work, which I think Ray is talking about, it usually has to do with a potential loss of water quantity as opposed to water quality. We don't have those happen a lot, but the Surface Mining Act outside the requirements of this particular amendment has a protection for restoration of the loss of water due to mining." He explained that if a person lost a domestic well or an agricultural well, the coal operator would be responsible for the replacement of that source of water.

Martha Clark, Chief of the Watershed Branch, Indiana Department of Environmental Management, submitted written comments to the Commission. Clark said she was the previous Chief of the Groundwater Section and was "intimately involved for many years" in the development of the Groundwater Quality Standards rule, which the DNR, Division of Reclamation is trying to pull into their rule to meet the requirement of those standards.

Clark stated, "We believe at IDEM that these amendments, coupled with existing regulatory controls, meet the goals of groundwater quality standards rule and demonstrate as required in Section 2 of the groundwater quality standards rules that DNR will ensure that facilities practices and activities are designed and managed to eliminate and minimize potential adverse impacts to the existing groundwater quality." She said IDEM wanted to "emphasize" the importance that DNR staff implement the revised regulations to ensure that the goals of the groundwater quality standards. "We support the final adoption of the rule by the Commission."

Nat Noland, President of the Indiana Coal Council addressed the Commission. He said, "I appreciate the opportunity to be here today to testify on this rule of proposal before you. Noland stated that he represented the Indiana Coal Council, which is a trade association that represents approximately 90% of the Indiana's coal operators throughout southwest Indiana. He said, "As we debate this rule today, I think it's important that we all remember that this rule is not a requirement of any federal law, and particularly the Federal Surface Mine and Control Reclamation act. Noland explained that the rule proposal was a result of a separate and independent state statute that was passed in 1988 to ensure groundwater quality protections throughout Indiana. He noted that IDEM promulgated the groundwater rule as indicated and "your job today is to implement that rule today as part of the surface mine program. Staff has proposed a rule that does just that. It implements IDEM's rule; that is all that is required. Any concerns that have been raised by others about the standards or the place where the standards should apply are more appropriately addressed to IDEM, who proposed and adopted the original groundwater rule." Noland said, that although coal mining is "one of the heaviest regulated industries in Indiana, we do support this rule today." He stated that the nonrule policy does a "good job" of explaining to the ICC and the regulated community, and to others how this rule will be implemented."

Noland stated that coal mining has been conducted in Indiana for over 100 years. "Throughout that time, and particularly since the passage of the federal law in 1977, there had been virtually no significant effects on groundwater quality outside what will be the groundwater management zone after this rule is adopted today." He supported and "confirmed" his statement by citing an informal study that IDEM completed at the Peabody Linnville Mine years ago.

He said that third parties, as well as the coal industry participated in the development of the IDEM rule and the rule proposal before the Commission. Noland said that IDEM's Task Force and their Rule Workgroup had discussed coal mine issues "specifically and exhaustively several times." "While the IDEM rule does not address nondrinking water wells that some in the public were concerned with, the changes made today proposed by staff will offer protection for nondrinking water wells and drinking wells." Noland noted that third parties had raised concerns about the location of the groundwater management zone. "IDEM directed other implementing agencies, such as DNR, to establish groundwater management zones for their regulatory program as this rule reflects." Noland said the proposed nonrule policy does a "good job" explaining how the groundwater management zone will be created and how monitoring will occur throughout the mining activities. Noland said that the Indiana public already has protection for drinking water wells that no other state or federal government has provided. He said the coal industry proposed legislation a few years ago before the Indiana General Assembly to expand a post-1977 reclamation fund to be used to provide monies to replace drinking water wells that may be affected by past mining practices. "Monies in the fund come solely from civil penalties paid by coal operators." He said the proposed rule, with the Indiana surface mining laws and statutes and the fund provide "more than adequate protection to property owners."

Noland said that third parties also commented that certain groundwater standards should apply within the mined area. "That notion was completely contrary to IDEM's rule, and no further changes should be made in a proposed rule. He noted that Reclamation staff indicated in their response to comments, "mineralization of groundwater within a mined area will occur, but the extent of that mineralization cannot be predicted. Groundwater in a mined area will not be used for drinking water and does not need monitoring by these rules. The purpose for the Groundwater Management Zone is to ensure that the effects will not occur outside the boundaries of the groundwater management zone." Noland said the proposed rules "are not required by Indiana Surface Mining law or the federal law as previously indicated. In fact, groundwater standards are not a part of regulatory program in many coal-mining states; however, we will support the rule today. Coal mine operators can implement the rule and we urge you to go forward with the document that has been presented by the staff."

Rae Schnapp represented the Hoosier Environmental Council. Schnapp thanked the DNR for amending the rule to change the groundwater management zone so that it does not extend beyond the property boundaries. "That is a very important aspect of the rule. Schnapp expressed that the groundwater management zone is essentially a "sacrifice zone where no standards apply, and that zone is 300 feet deep." She stated that HEC did not "believe" the proposed rule was "not consistent" with federal SMCRA rules. Schnapp explained that federal SMCRA requires operators to focus first on prevention. The SMCRA approach is to view mining as a temporary activity, a temporary land use, and full capability of land use is to be restored." She stated that groundwater contamination is "likely to be permanent."

Schnapp stated that the proposed rule "only protects existing wells and allows the ambient groundwater to be contaminated." She added that the proposed rules also allow for wells used for livestock or irrigation to be contaminated "up to a point." Schnapp said that HEC does "appreciate" the change in the rule that puts the interceptor wells between the mining activity and an existing drinking water well, but "we feel that really is not enough." She said that HEC had submitted comments and suggestions about language that would define minimizing pollution that have not been incorporated into the rule. "We urge you to seriously consider that, because we think that the rule needs to have more focus on prevention.

Director Goss commented, "I think we all, at least the people who have been on this committee, know the importance of this. We've anxiously awaited IDEM's guidelines." He stated the DNR may be the first state agency to propose these detailed regulations, and may be "even ahead of up IDEM's other divisions in adopting this." Goss thanked the Division of Reclamation for the amount of effort put into the rule proposal, and also thanked the private industry, Indiana Coal Council, and the Hoosier Environmental Council and other citizen groups. "We have had literally dozens and dozens of conversations this year, and it's all been positive and friendly

on how to improve this and make it work. I think this has been a very good process."

Jerry Miller moved to approve for final adoption of SMCRA Water Quality Amendments in 312 IAC 25 to implementing 327 IAC 2. Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

Jerry Miller moved to adopt the Nonrule Policy Document (Information Bulletin #38) implementing the Indiana groundwater standards at coalmines regulated under IC 14-34.

Damian Schmelz seconded the motion. Upon a voice vote, the motion carried.

The Wright testimony, on page 4, misrepresents groundwater protection standards in Illinois and the regulatory provisions provided under SMCRA. The testimony reveals the author has a lack of understanding of the mining process and how the local geology influences groundwater after the commencement mining operations. Mr. Wright requests that SMCRA establish numeric standards to determine when contamination occurs. While we agree with Mr. Wright's statement that it would be unrealistic to assume groundwater in mined areas will remain pristine, the establishment of nationwide, numeric groundwater standards would be unrealistic considering the varying geologic conditions of each region of the nation.

Illinois has statewide groundwater protection standards for offsite impacts as provided by Illinois Environmental Protection Agency's groundwater rules at 35 IAC 620. Mining related constituent standards are set at the existing concentrations in the groundwater within the permit boundary at the time of reclamation. Constituents outside the permit boundary must comply with the applicable class standard for the groundwater. These rules were implemented to protect the groundwater supply surrounding a mining operation and provide a numeric standard for determining when contamination does occur. The use of regional groundwater protection standards is a much more practical approach than trying to establish national standards for groundwater.

Mr. Wright has obviously been misinformed concerning the "high levels of arsenic" mentioned on page 6. The wells with "high levels of arsenic" are not in the same aquifer as that being addressed at the mine site. And, the so-called "high levels" of arsenic are within state standards. Mr. Wright fails to acknowledge that the company is addressing its environmental responsibility in a professional manner while under the jurisdiction of the state regulatory agencies using existing regulations.

On page 6 of his testimony, Mr. Wright states that "Illinois DNR ignored the request for a Public Hearing about the high hazard dams that contain waste. In 2003, the DNR granted a public hearing on the reclamation plan, but refused to answer any of the public's questions on the plan."

> The request of a public hearing concerning high hazards dams is a provision of a law not related to SMCRA and not enforced by the division of DNR that is the regulatory authority for Illinois' Permanent Program. The public hearing held in 2003 was held according to the regulations. The purpose of such hearings is to receive public comments, but once the hearing record closed agency officials were available to answer questions. All comments received at the hearing were addressed in the permit decision document issued concerning this application. In addition, the Illinois DNR in 2006 held a lengthy public informational forum to discuss questions from the public. Among the issues raised were design, maintenance and use of the "high hazard dam" as refuse retention structures at the reclaimed mine site in question.

Mr. Wright goes on to state on page 6 that "In 2003, the reclamation plan was approved despite the fact that the mining company did not tell where the monitoring wells on the site were located. Illinois DNR itself admitted in its own evaluation that this made it impossible to determine whether any possible contamination was migrating off site....The reclamation plan has been under appeal for over 4 years. The appeal is now at the federal level."

> These statements are untrue. The application for the permit revision in question contained the location of the monitoring wells, and the admission referred to is a total fabrication.
>
> The permit revision referred to was issued on March 3, 2004. Local citizens requested administrative review of the decision to issue the revision. The final administrative ruling on the decision to issue the revision was handed down on May 25, 2005—approximately two years after the review was requested—not four years. The ruling was in DNR's favor.
>
> This permit revision approval is not the subject of a federal appeal. The federal appeal deals with a notice sent to DNR by OSM alleging violations of performance standards. DNR's response to OSM concerning these allega-

tions was deemed appropriate and no federal enforcement action was taken. A local citizen is now appealing OSM's decision to not take enforcement action, not DNR's decision to issue the revision.

In referring to a pipeline to the Kaskaskia River, on page 6 Mr. Wright's testimony alleges that DNR sent legal arguments to the OSM for review, "who found that the mine arguments were not valid. In December 2006, Illinois DNR nevertheless changed their position in favor of the mine."

DNR forwarded the legal rationale of the mine operator to OSM requesting their solicitor's opinion. The solicitor did not find the arguments invalid as Mr. Wright claims. The DNR's decision to approve the pipeline is the subject of administrative review requested by the citizen. A recent ruling by the administrative hearing officer presiding over this review found the citizen's "pleadings grossly mis-characterize both the Illinois Department of Natural Resources and the federal Office of Surface Mining analysis".

On page 7 of his testimony Mr. Wright makes several statements concerning Illinois' regulation of longwall mining. All of these statements are misrepresentations of the facts. Mr. Wright obviously accepted verbatim the positions of an anti-longwall mining group in Montgomery County without bothering to confirm whether the information provided was factual.

"Illinois DNR has claimed that it has no authority over longwall mines even though SMCRA regulates the surface impacts of underground mining."

This statement is blatantly false. In Illinois, longwall mining has been performed in 11 different mining operations located within 6 counties. To date, over 240 modern longwall panels have been extracted in Illinois. Since 1983, Illinois regulations have required the mitigation of all subsidence impacts, resulting from all types of underground mining, to both land and structures. There are currently two longwall mines operating in Illinois. Land and structures impacted by subsidence from these mines are routinely repaired and landowners are paid for crop losses incurred until repairs are completed.

"The Illinois DNR has repeatedly refused to address citizen concerns about possible damage to their homes and farms on the grounds that SMCRA does not give them authority to regulate underground mines."

This statement is false. DNR personnel have met numerous times with citizens as part of Farm Bureau sponsored meetings to discuss the issue of underground mining and subsidence repair.

"Illinois DNR has denied the [lands unsuitable petition] repeatedly on the grounds it cannot accept such petitions for underground mines, but this would appear to directly contradict their own regulations, which declare 'An area shall be designated as unsuitable for all or certain types of mining operations.'"

The regulations state at 30 CFR 762.11, and the Illinois counterpart 62 Ill. Adm. Code 1762.11, that lands unsuitable petitions may be submitted for surface coal mine operations. The definition of surface coal mine operations states that "Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal."

This regulatory definition of "surface coal mining operations" describes activities conducted on the surface of lands in connection with a surface coal mine or surface operations. Such surface mining extraction activities have been interpreted to include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining....and all areas on which such activities occur or where such activities disturb the natural land surface. These surface coal mining activities are distinguished from underground coal mining activities. Underground coal mining activities include the standard mining methods known as room and pillar excavation, high extraction retreat mining, and longwall mining.

The petition referred to sought a lands unsuitable for mining designation based upon longwall mining operations. Longwall mining is not a surface coal mining extraction method; it is an extraction method used for underground coal mining operations. Longwall mining extraction is not conducted on the surface of the land, and as such, it is not a surface coal mining operation. DNR determined that it is not authorized to review lands unsuitable for mining petitions that do not relate to surface coal mining operations.

"The Illinois DNR seems to be completely unwilling to take any sort of regulatory action in regards to longwall mining. This situation leaves citizens with no recourse for protecting their homes and their property from possible damage from longwall mines."

As indicated above this accusation is simply not true. Illinois has over 24 years of experience in regulating longwall mining and the affects to both land and structures resulting from subsidence caused by longwall mining. All underground mine operators are required to repair subsidence damage resulting from underground mining, whether it be conventional room and pillar mining or longwall mining.

-----Original Message-----
From: Giles, Mike
Sent: Tuesday, June 19, 2007 1:16 PM
To: Lambert, Butch; Barker, Ernie
Cc: Artrip, Ken
Subject: FW: Permit Application No. 1003841 A & G Ison Rock Ridge
Importance: High

The initial field review by DMLR on the afternoon of 6/13/07 noted gas and logging activity only in the area of this application (1291 acres). **Ken Artrip and I plan to meet Ms Selvedge and and "a friend" at the Payless parking lot in Appalachia on Tues. 6/26/07 at 8:30 to review the area of this permit application.** Please let me know if you have any questions or comments.

Thanks,
Mike

-----Original Message-----
From: Barker, Ernie
Sent: Thursday, June 14, 2007 8:22 AM
To: Lambert, Butch
Cc: Vincent, Les; Williams, Roger; Giles, Mike; Varner, Eddie; Stanley, Randy; Artrip, Ken; Smith, Carolyn; Sexton, Cathy
Subject: RE: Permit Application No. 1003841 A & G Ison Rock Ridge
Importance: High

This application has at least 4 entrances from public roads. When this was received from Harve, I determined that Ken Atrip was the inspector. Ken was in the field and not answering the radio. Randy and Eddie where in the office. We had the application map printed. Called for Ms Selvadge and did not get an answer. When Ken answered the radio and talked with Eddie and Randy, they developed a plan to look at the permit yesterday afternoon. By 5:00 they had determined that the only activity that had occurred on the permit was logging and gas and oil development. When they returned to the office, they contacted Ms Selvadge who stated that all her information was third party and she would have to check her sources and get back to them next week.

We will be writing the above information and the original complaint into a complaint and inspection report. If we do not hear from Ms Selvdage by mid-next week the complaint will be closed out.

Thanks!!

Ernie Barker
Reclamation Services Manager

ernie.barker@dmme.virginia.gov

(276) 523-8197

-----Original Message-----
From: Lambert, Butch
Sent: Thursday, June 14, 2007 7:32 AM
To: Barker, Ernie
Cc: Vincent, Les
Subject: RE: Permit Application No. 1003841 A & G Ison Rock Ridge

Please keep me posted on the investigation of this complaint.

> -----Original Message-----
> **From:** Mooney, Harve **On Behalf Of** DMLR Info Mailbox Account
> **Sent:** Wednesday, June 13, 2007 1:52 PM
> **To:** Barker, Ernie
> **Cc:** Lambert, Butch; Vincent, Les
> **Subject:** FW: Permit Application No. 1003841 A & G Ison Rock Ridge
>
> Ernie, Butch, Les
>
> Please note this request for an inspection by the citizen on the area de-lineated by the application 1003841.
>
> Harve
>
> -----Original Message-----
> **From:** Kathy Selvage [mailto:kselvage@gmail.com]
> **Sent:** Tuesday, June 12, 2007 4:35 PM
> **To:** DMLR Info Mailbox Account
> **Subject:** Permit Application No. 1003841 A & G Ison Rock Ridge
>
> June 12, 2007
>
> Via Email (dmlrinfo@dmme.virginia.gov)
>
> Department of Mines, Minerals and Energy
> Division of Mined Land Reclamation
> P.O. Drawer 900
> Big Stone Gap, VA 24219
>
> Re: Citizen Request for Inspection of Unpermitted Mining Activities

Dear Sir or Madam:

Today I received information indicating that A&G Coal Corporation has begun surface coal mining operations without a permit. I believe that the mining operator has begun building roads and clearing the site in anticipation of mining. As I understand it, the mining company has applied for a permit (Application # 1003841) to mine the area it is currently disturbing, but that permit has not been issued. A&G's mining project is known as the Ison Rock Ridge Surface Mine near Appalachia, Virginia.

Conducting such activities without a permit would violate the State and federal surface mining acts. Pursuant to 4 VAC 25-130-700.5 (and 30 U.S.C. 1291(28)), "surface coal mining operations" includes clearing land on a proposed mining site, building roads on the proposed site or building roads on an adjacent site in connection with the proposed mine. Under 4 VAC 25-130-773.11, no person may conduct any surface coal mining
operations without a permit.

Accordingly, I request an immediate inspection of the proposed mining operation (and any adjacent areas that are being disturbed in connection with the proposed mine) as soon as possible pursuant to 4 VAC 25-130-842.12 and any other relevant provisions of Virginia law. I would like to accompany your authorized representative on that inspection.

The harm currently being caused by the mining operator is ongoing, substantial and irreversible. I live near Wise, Virginia. I am the Vice President of Southern Appalachian Mountain Stewards (SAMS). The ongoing
harm caused by the mining operator directly affects the interests of SAMS' members who live and recreate near the mining site. I ask that once you determine that surface mining a proceeding without a permit, you order the operator to cease such operations and order the operator to begin reclamation activities immediately.

Sincerely,

Kathy Selvage
6611 Kemper Road
Wise, VA 24293
(276) 328-1223

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES, MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION
P.O. DRAWER 900, BIG STONE GAP, VA 24219
TELEPHONE: (276) 523-8198

COMPLAINT INVESTIGATION

OFFICE USE ONLY
COPIED TO:
- Complainant
- Company
- P.R. Manager
- Technical Section
- Other (specify)

COMPLAINT NO.	INVESTIGATION NO.	PERMIT NO.	DATE/TIME RECEIVED	DATE OF REPORT
0700080	KWA0002985		6/13/07 01:52 PM	7/5/07

COMPLAINANT NAME, ADDRESS, PHONE	COMPANY/PERMITTEE NAME, ADDRESS, PHONE
Selvage, Kathy 6611 Kemper Road Wise, VA 24293 (H) (276)328-1223	A&G Coal Company P.O. Box 1010 Wise, VA 24293 276/328/3421

LOCATION	COUNTY(S)	WISE

The Application No.1003841 submittal is a 1291.64 acre area located in the Callahan, Preacher and Looney Creek Watersheds in Wise County, Virginia.

COMPLAINT STATUS/DATE	COMPLAINT TYPE	INVESTIGATION TYPE
RESOLVED 7/5/07	ILLEGAL MINING	CLOSE OUT

ENFORCEMENT			
TYPE OF ACTION	ACTION NUMBER	COMPLAINANT NOTIFIED	REQUEST TO ACCOMPANY
			YES

ATTACHMENT(S): 0

COMMENTS FROM:		
COMPLAINANT	Selvage, Kathy	06/13/07 04:00 PM
COMPANY OFFICIAL		
INVESTIGATOR/SIGNATURE	ARTRIP, KEN	Ken Artrip

COMPLAINANT'S COMMENTS	Selvage, Kathy	06/13/07 04:00 PM

I called Ms. Selvage at telephone (276) 328-1223 at approximately 4:00PM on June 13. DMLR inspectors had reviewed the area in question. Ms.Selvage stated in her complaint letter that the mining company has already started mining operations without a permit on this application. It was also stated that the mining company has started building roads and clearing the site in anticipation of mining. It was also requested that after it was determined that surface mining was proceeding without a permit, that the mining company be order to cease such operations and to begin reclamation activities on the site.

I talked to Ms. Selvage on the telephone on the evening of 06/13/07. She informed me of the information stated above and that this information was put in a letter that she mailed to the Division. I told her the site had been immediately inspected and that I could not find any active mining activities on this permit application. Ms. Selvage said that her information was third party and that she would call me back and schedule a meeting to look at areas on the permit application in the field.

Ms. Selvage called me on 06/18/07 and scheduled a meeting at the Payless in Appalachia at 8:30AM on 06/26/07.

COMPANY OFFICIAL'S COMMENTS

DMLR RECEIVED
JUL - 5 2007
ENF

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES, MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION
P.O. DRAWER 900, BIG STONE GAP, VA 24219
TELEPHONE: (276) 523-8198

KWA0002985

COMPLAINT INVESTIGATION

Since no mining activities were located during the inspection of 06/13/07 the mining company was not contacted. On 07/05/07, I contacted A&G company officials to insure that they have no mining activities on the area covered by the complaint. I talked to Mr. Joe Buchanan and Mr. Doug Shupe and was informed that A&G Coal Company has not conducted any construction activities including pre-mining, clearing, mining or logging activities in the complaint area.

INVESTIGATOR'S DESCRIPTION, COMMENTS, AND RECOMMENDATIONS	ARTRIP, KEN

On June 13, 2007, I received a call from DMLR Inspector Eddie Vamer informing me that a complaint was received from Ms. Selvage of illegal mining activities on Application #1003841, Ison Rock Ridge Surface Mine submitted by A&G Coal Company. Mr. Varner requested that I meet with him and DMLR inspector Randy Stanley and all three inspectors field review the Application area.

On the afternoon of June 13, 2007 after the complaint was received, the proposed mining area was field reviewed by DMLR inspectors. All four entrances to the area were checked for mining traffic activity and most of the 1291.64 acre area was field reviewed. The area contains logging and gas well activities. Also two approved Coal Exploration Notices are located in the area of this application but no illegal mining activities were located.

A meeting is scheduled with Ms Selvage on June 26,2007 to field review the area of her concern as stated above.

On June 26, 2007, Mike Giles and I met with Ms. Selvage and Mr. Ryan Dingus to discuss the Ison Rock Ridge Surface Mine Application # 1003841 in Appalachia. They were advised that we could discuss the proposed permit but could not make a field visit. Mike advised Ms. Selvage that DMLR made an investigation of her initial complaint on the afternoon of June 13, 2007 and found no mining activities being conducted on this proposed application.

Mike and I reviewed the Application maps and discussed provisions of the plan with them. They said that they may drive by some of the proposed area but did not plan to field review the area. The meeting ended at approximately 9:20AM.

07/02/07 – Selvage letter of 06/29/07 received. This complaint investigation report addresses all of the writer's concerns.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES, MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION
P.O. DRAWER 900, BIG STONE GAP, VA 24219
TELEPHONE: (276) 523-8198

KWA0002985

COMPLAINT INVESTIGATION

In accordance with 4 VAC 25-130-842.15 of the Virginia Coal Surface Mining Reclamation Regulations (Review of Decision not to Inspect or Enforce):

(a) Any person who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation may ask the Director to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for an inspection under ' 4 VAC 25-130-842.12. The review request shall be in writing, include a statement of how the person is or may be adversely affected, explain why the decision merits review, and be submitted within 30 days of the Division's decision not to inspect or enforce.

(b) The Division shall conduct the informal review and inform the person, in writing, of the results of the review within 30 days of the agency's receipt of the request. The person alleged to be in violation shall also be given a copy of the informal review results.

(c) Informal review under this Section shall not affect any rights, which a citizen may have to formal review under Section 45.1-249 of the Act[1], or a citizen's right to file suit pursuant to Section 45.1-246.1 of the Act.

(d) Any person who requested a review of a decision not to inspect or enforce under this Section and who is or may be adversely affected by any determination made under Subsection (b) of this Section may request review of that determination by filing an application for formal review and request for hearing within 30 days of the informal review decision under the **Virginia Administrative Process Act** Section 2.2-4000 et seq of the Code of Virginia.

A request for informal review of the complaint investigation or formal review of the informal review decision should be addressed to the attention of the:

Hearings Coordinator
Division of Mined Land Reclamation
P. O. Drawer 900
Big Stone Gap, Virginia 24219

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of Surface Mining
Reclamation and Enforcement

TEN-DAY NOTICE

Number X07-130-052-001 TV 1

Originating Office: Big Stone Gap Field Office
US DOI, Office of Surface Mining
1941 Neeley Rd., Suite 201
Compartment 116
Big Stone Gap, VA 24219

Telephone Number: (276) 523-4303

Ten-Day Notice to the State of VA

You are notified that, as a result of Citizen Information (e.g. a federal inspection, citizen information, etc) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken.

Permittee: A & G COAL CORPORATION County: WISE
(Or Operator if No Permit)

Mailing Address P.O. BOX 1010, Wise, VA. 24293

Permit Number: UNKNOWN Mine Name:

[X] Surface
[ ] Underground
[ ] Other

01 NATURE OF VIOLATION AND LOCATION:
Alleged operator has disturbed mine site prior to approval of surface mine permit by DMLR.

Section of State Law, regulation or Permit Condition believed to have been violated. 4 VAC 25-130-773.11(a)

RECEIVED
JUL - 9 2007
ENF

NATURE OF VIOLATION AND LOCATION:

Section of State Law, regulation or Permit Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION:

Section of State Law, regulation or Permit Condition believed to have been violated:

Remarks or Recommendations:
Alleged disturbing mine site prior to approval of surface permit. Application #1003841
Alleged DMLR fail to conduct appropriate inspections.

Date of Notice: 07/02/2007

Signature of Authorized Rep.: Tim Brehm

Print Name and ID: Tim Brehm ID# 052

Certified Mail #
7006 0100 0006 4487 6278

Page 1 of 1
Revised October 1, 1998

Blankenship, EJB, MAG, Vincent, Hampton, Prestup, Haynes – Duebrick to OSM 7/9/07

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of Surface Mining
Reclamation and Enforcement

TEN-DAY NOTICE

Number X07-130-052-001 TV 1

Originating Office: Big Stone Gap Field Office
US DOI, Office of Surface Mining
1941 Neeley Rd., Suite 201
Compartment 116
Big Stone Gap, VA 24219

Telephone Number: (276) 523-4303

Ten-Day Notice to the State of VA

You are notified that, as a result of Citizen Information (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken.

Permittee: A & G COAL CORPORATION County: WISE
(Or Operator if No Permit)

Mailing Address: P.O. BOX 1010, Wise, VA. 24293

Permit Number: UNKNOWN Mine Name:

[X] Surface
[ ] Underground
[ ] Other

01 NATURE OF VIOLATION AND LOCATION:
Alleged operator has disturbed mine site prior to approval of surface mine permit by DMLR.

Section of State Law, regulation or Permit Condition believed to have been violated: 4 VAC 25-130-773.11(a)

NATURE OF VIOLATION AND LOCATION:

RECEIVED
JUL - 9 2007
ENF

Section of State Law, regulation or Permit Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION:

Section of State Law, regulation or Permit Condition believed to have been violated:

Remarks or Recommendations:
Alleged disturbing mine site prior to approval of surface permit. Application #1003841
Alleged DMLR fail to conduct appropriate inspections.

Date of Notice: 07/02/2007
Certified Mail #
7006 0100 0006 4487 6278

Signature of Authorized Rep.: Tim Brehm
Print Name and ID: Tim Brehm ID# 052

Page 1 of 1
Revised October 1, 1998

Blumhardt, EJB, MAG, Yancarik, Wampler, Pedrup, Haynes - Date back to OSM 7/9/07

U. S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING
Mine Site Evaluation
State Program

1. Permittee/Person: A & G COAL CORPORATION	9. Permit Number: UNKNOWN	10. Permit Type: NP
2. Address: P.O. BOX 1010	11. Field Visit Date (mm - dd - yyyy): 07/02/2007	12. Purpose: CCR
3. City: Wise	4. State: VA	13. SRA Present: N
5. Zip Code: 24293	6. Phone Number: (276) 328-3421	14. Permit Status: NA
7. Operator Name, if Different than Permittee:	15. Site Status: NS	16. Facility Type: A
8. Mine Name:	17. OSM Office #: 130	18. CCID #: CC07-130-001
	19. Land Code: S	20. M.S.H.A ID #:
	21. State Abrev.: VA	22. County Name: WISE
	23. AVS Permittee Entity ID Number: 119030	24. State Office:

25. Hours		26. Signature Block	27. Reviewing Official:
2.0	a. Permit Review	Signature:	Signature:
0.0	b. Site Visit Time	Tim Brehm ID # 052	Review Date (mm - dd - yyyy): 7/2/07
0.0	c. Travel Time	Printed Name:	Is Supplemental MSE Page Used Y/N: Y
2.0	d. Report Writing	Date: 07/02/2007	

Permit Type — Item 10 IP = Interim Program, PP = Permanent Program, NP = No Permit

Purpose Type Codes Item 12

Ovs.... Oversight
Ass.... Assistance
RFx.. Reclamation Fees
Fxx.. Federal Actions
CCR.... Citizen Complaint Referral (non site visit)
CC.... Citizen Complaint (Initial site visit)
CCF.... Citizen Complaint Follow-up

Joint Inspection — Item 13 A joint inspection is when a state inspector accompanies an OSM inspector any time during the review of the mine site.

Permit Status — Item 14

A.... Active, Coal mining and reclamation activities occurring or permitted but not yet disturbed.
IN.. Inactive (Permanent Program Permit): Phase II completed or Temporary Cessation of Operations. (Interim Program Permit) Coal mining completed and reclamation activities initiated.
BR.. Bond Release: Reclamation completed and State Regulatory Authority (RA) has released all of the bond (Phase III Release.)
AB ... Abandoned: All surface and underground coal mining activities have ceased and operator has left the site without completing reclamation as defined in 30 CFR 840.11(g).
AB1.. Bond Forfeiture: Bond forfeiture officially in process or completed, and, reclamation in progress or not yet commenced.
AB2.. Partially Reclaimed Forfeiture: Forfeited site where all bonds have been used to reclaim site, but site not reclaimed to Program standards.
AB3.. Reclaimed Forfeiture: Forfeited site that has been reclaimed to Program standards.
NA... Not Applicable: When site is unpermitted.

Site Status Codes — Item 15

ND.. No Disturbance. No coal mining and reclamation operations have been started.
EX.. Coal Exploration: Coal exploration operations have started and where coal mining operations have not begun.
AP.. Active Coal Producing. Coal surface mining activities are occurring.
AN.. Active Non-Producing: Active non-producing facility such as tipple or preparation plant.
NM.. No Mining: The Permit Status is active, site is not in Temporary Cessation, no surface coal mining activity, and site not regraded.
MC.. Mining Complete: No mining activity on site, site regraded and awaiting phase bond release.
TC.. Temporary Cessation: The RA has granted cessation of mining pursuant to 30 CFR 816/817.131(b).
P1.. Phase I Release: At least Phase I bond release granted for entire permitted area. For interim permits, partial bond release.
P2.. Phase II Release: At least Phase II bond release for the entire permitted area.
P3.. Phase III Release: Reclamation completed and the RA has released all bond.
NS.. Non-Site Visit: Status of site not determined.
FP.. Forfeiture Pending: The RA is pursuing actions to revoke the permit, collect the performance bond(s), and/or reclamation of forfeited site is in progress.
FR.. Forfeited and Reclaimed: Forfeiture reclamation completed.
FO.. Abandoned Site: Abandoned site that is permitted but there is no bond.
WC.. Wildcat: Coal mining and reclamation operations have or are taking place and the activity is not covered by the required permits from the RA.

Facility Type Codes — Item 16

A... Surface
B... Underground
C... Preparation Plant
D... Ancillary (Haulroad, Conveyor, and/or Rails)
E... Refuse and/or Impoundment
F... Loading Facility and/or Tipple
G... Stockpiles
H... Exploration Permits
I... Notice of Intent to Explore
J... Exempt 16 and 2/3
K... Government Financed Construction Exemption
L... Remining site permitted under 30 CFR785.25

Small Business Regulatory Enforcement Fairness Act (SBREFA)
Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you are a small business (a business with 500 or fewer employees including those of affiliates) and wish to comment on the enforcement or compliance activities of OSM, call 1-888-REG-FAIR (1-888-734-3247).

U. S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING

Mine Site Evaluation — **State Program Continuation Page**

Permittee/Person: A & G COAL | Permit Number: UNKNOWN | Field Visit Date: 07/02/2007

28. Performance Standard Categories

Codes: 1=Compliance, 2=Noncompliance, 3=Not Planned, 4=Not Started, 5=Noncompliance Identified Elsewhere, 6=Previously Cited

A. Administrative
1. 2 Mining within Valid Permit
2. ___ Mining within Bonded Area
3. ___ Terms & Conditions of Permit
4. ___ Liability Insurance
5. ___ Ownership and Control
6. ___ Temporary Cessation
7. ___ AML Rec. Fees -- Non-Respondent
8. ___ AML Rec. Fees -- Failure to Pay

B. Hydrologic Balance
1. ___ Drainage Control
2. ___ Inspections & Certifications
3. ___ Siltation Structures
4. ___ Discharge Structures
5. ___ Diversions
6. ___ Effluent Limits
7. ___ Ground Water Monitoring
8. ___ Surface Water Monitoring
9. ___ Drainage -- Acid-Toxic Materials
10. ___ Impoundments
11. ___ Stream Buffer Zones

C. Topsoil & Subsoil
1. ___ Removal
2. ___ Substitute Materials
3. ___ Storage and Protection
4. ___ Redistribution

D. Backfilling & Grading
1. ___ Exposed Openings
2. ___ Contemporaneous Reclamation
3. ___ Approximate Original Contour
4. ___ Highwall Elimination
5. ___ Steep Slopes (includes downslope)
6. ___ Handling of Acid & Toxic Materials
7. ___ Stabilization (rills and gullies)

E. Excess Spoil Disposal
1. ___ Placement
2. ___ Drainage Control
3. ___ Surface Stabilization
4. ___ Inspections & Certifications

F. Coal Mine Waste (Refuse Piles/Impoundments)
1. ___ Drainage Control
2. ___ Surface Stabilization
3. ___ Placement
4. ___ Inspections and Certifications
5. ___ Impounding Structures

G. Use Of Explosives
1. ___ Blaster Certification
2. ___ Distance Prohibitions
3. ___ Blast Survey/Schedule
4. ___ Warnings & Records
5. ___ Control of Adverse Effects

H. ___ Subsidence Control Plan

I. Roads
1. ___ Road Construction
2. ___ Certification
3. ___ Drainage
4. ___ Surfacing and Maintenance
5. ___ Reclamation

J. Signs & Markers
1. ___ Signs
2. ___ Markers

K. ___ Distance Prohibitions

L. Revegetation
1. ___ Vegetative Cover
2. ___ Timing

M. ___ Postmining Land Use

N. Other

General Performance Catagory		
___	___	1)_____
___	___	2)_____
___	___	3)_____

Performance Standard Catagories
30 CFR Counterpart

A. Administrative
1. Valid Permit 773.11
2. Mining within Bonded Area 773.11
3. Terms & Conditions of Permit 773.17
4. Liability Insurance 800.60
5. Ownership and Control 778.13
6. Temporary Cessation ..... 842.11(e) & 816/817.131
7. AML Rec. Fees -- Non-Respondant ..... 870.15(b)
8. AML Rec. Fees -- Failure to Pay ..... 870.15(a)

B. Hydrologic Balance ..... (816/817.41-57)
1. Drainage Control 45
2. Inspections & Certifications ..... 49(a)(10)
3. Siltation Structures 46
4. Discharge Structures 47
5. Diversions 43
6. Effluent Limits 42
7. Ground Water Monitoring ..... 41(c)
8. Surface Water Monitoring ..... 41(e)
9. Drainage--Acid - Toxic Materials ..... 41(f)
10. Impoundments 49
11. Stream Buffer Zones 57

C. Topsoil & Subsoil ..... (816/817.22)
1. Removal ..... 22(a)
2. Substitute Materials ..... 22(c)
3. Storage and Protection ..... 22(c)
4. Redistribution ..... 22(d)

D. Backfilling & Grading ..... (816/817.95-107)
1. Exposed Openings ..... 816/817.13, 14, 15, & 823 11 & 21
2. Contemporaneous Reclamation 100
3. Approximate Original Contour ..... 102(a)(1)
4. Highwall Elimination ..... 102(a)(2)
5. Steep Slopes (includes downslope) 107
6. Handling of Acid & Toxic Materials ..... 102(c)
7. Stabilization (rills and gullies) ..... 95(b)

E. Excess Spoil Disposal ..... (816/817.71-74)
1. Placement ..... 71(e)
2. Drainage Control ..... 71(f)
3. Surface Stabilization ..... 71(g)
4. Inspections & Certifications ..... 71(h)

F. Coal Mine Waste (Refuse Piles/Impoundments) ..... (816/817.81-84)
1. Drainage Control ..... 83(a)
2. Surface Stabilization ..... 83(b)
3. Placement ..... 83(c)
4. Inspections and Certifications ..... 83(d)
5. Impounding Structures 84

G. Use of Explosives ..... (816/817.61-68)
1. Blaster Certification ..... 61(c)
2. Distance Prohibitions ..... 61(d)
3. Blast Survey/Schedule 62-64
4. Warnings & Records ..... 66 & 68
5. Control of Adverse Effects 67

H. Subsidence Control Plan ..... (817.121-122)

I. Roads ..... (816/817.150-151)
1. Road Construction ..... 150(c)
2. Certification ..... 151(a)
3. Drainage ..... 150(b)-151(d)
4. Surfacing and Maintenance ..... 150(c)-151(d)
5. Reclamation ..... 150(f)

J. Signs & Markers ..... (816/817.11)
1. Signs ..... 11(a),(b),&(c)
2. Markers ..... 11(a),(b),(d),(e),&(f)

K. Distance Prohibitions ..... (761.11)

L. Revegetation ..... (816/817.111-116)
1. Vegetative Cover ..... 111 & 116
2. Timing 113

M. Postmining Land Use ..... (816/817.133)

U. S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING
Mine Site Evaluation

State Program Continuation Page

Permittee\ Person: A & G COAL CORPORATION | Permit Number: UNKNOWN | Field Visit Date: 07/02/2007

29. Off-Site Impact Data and Identified Violation Data.
List all Ten-Day Notice actions and all Federal NOV or CO actions taken or reviewed during this current OSM site visit. List the off-site impacts associated with either State or Federal actions taken during this site visit.

1. A. Specific State Law/Regulations Violated: 4 VAC 25-130-773.11(a)
B. Description: Alleged Operator has disturbed mine area prior to issuance of approved surface permit. (Application #1003841)
C. Performance Standard: A1 | D. Abated (Y/N): N
E. OSM Action: 2 | F. OSM Action Number: X07-130-052-001 | Viol.#: 01
G. Optional: | H. Any Off-Site Impacts Y/N: N
I. Latitude: °00'00" | J. Longitude: °00'00" | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

2. A. Specific State Law/Regulations Violated:
B. Description:
C. Performance Standard: | D. Abated (Y/N):
E. OSM Action: | F. OSM Action Number: | Viol.#:
G. Optional: | H. Any Off-Site Impacts Y/N:
I. Latitude: | J. Longitude: | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

3. A. Specific State Law/Regulations Violated:
B. Description:
C. Performance Standard: | D. Abated (Y/N):
E. OSM Action: | F. OSM Action Number: | Viol.#:
G. Optional: | H. Any Off-Site Impacts Y/N:
I. Latitude: | J. Longitude: | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

4. A. Specific State Law/Regulations Violated:
B. Description:
C. Performance Standard: | D. Abated (Y/N):
E. OSM Action: | F. OSM Action Number: | Viol.#:
G. Optional: | H. Any Off-Site Impacts Y/N:
I. Latitude: | J. Longitude: | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

OSM Action
1) Deferred to State Action
2) TDN Issued
3) NOV Issued
4) FTA-CO Issued
5) IH-CO Issued (Imminent Environmental Harm)
6) ID-CO Issued (Imminent Danger to Public)
7) Previously Cited by RA, Abatement Pending
8) Abated during or before OSM Inspection
9) Follow-up of Federal Action

Off-Site Impacts
For each type of impact and resource affected, enter "N, D, or J" to describe the degree of off-site impact:
N - Minor Occurrence
D - Moderate Occurrence
J - Major Occurrence

Revised December 4, 1998

June 12, 2007

Department of Mines, Minerals and Energy
Division of Mined Land Reclamation
P O. Drawer 900
Big Stone Gap, VA 24219

Re: Citizen Request for Inspection of Unpermitted Mining Activities

Dear Sir or Madam:

Today I received information indicating that A&G Coal Corporation has begun surface coal mining operations without a permit. I believe that the mining operator has begun building roads and clearing the site in anticipation of mining. As I understand it, the mining company has applied for a permit (Application # 1003841) to mine the area it is currently disturbing, but that permit has not been issued. A&G's mining project is known as the Ison Rock Ridge Surface Mine near Appalachia, Virginia.

Conducting such activities without a permit would violate the State and federal surface mining acts. Pursuant to 4 VAC 25-130-700 5 (and 30 U.S.C. 1291(28)), "surface coal mining operations" includes clearing land on a proposed mining site, building roads on the proposed site or building roads on an adjacent site in connection with the proposed mine. Under 4 VAC 25-130-773 11, no person may conduct any surface coal mining operations without a permit.

Accordingly, I request an immediate inspection of the proposed mining operation (and any adjacent areas that are being disturbed in connection with the proposed mine) as soon as possible pursuant to 4 VAC 25-130-842.12 and any other relevant provisions of Virginia law. I would like to accompany your authorized representative on that inspection.

The harm currently being caused by the mining operator is ongoing, substantial and irreversible. I live near Wise, Virginia. I am the Vice President of Southern Appalachian Mountain Stewards (SAMS). The ongoing harm caused by the mining operator directly affects the interests of SAMS' members who live and recreate near the mining site. I ask that once you determine that surface mining a proceeding without a permit, you order the operator to cease such operations and order the operator to begin reclamation activities immediately

Sincerely,

Kathy R. Selvage

Kathy Selvage
6611 Kemper Road
Wise, VA 24293
(276) 328-1223

June 27, 2007

Ian B Dye, Area Office Manager
Big Stone Gap Field Office
1941 Neeley Road
Suite 201, Compartment 116
Big Stone Gap, VA 24219

Re: Request for Federal Inspection of A&G Coal Corporation surface mining operation.

Pursuant to 30 U.S.C. §1271(a)(1) and 30 C.F.R. §§ 842.11 and 842.12, Southern Appalachian Mountain Stewards (SAMS) requests OSM to issue a ten-day notice and to conduct a federal inspection of ongoing mining activities at A&G Coal Corporation's Ison Rock Ridge Surface Mine near Appalachia, Virginia. We also request an order requiring A&G to cease all mining activities until it has obtained all necessary permits. We request such action to stop the violations that we allege below and to induce OSM to take any and all appropriate enforcement actions to cause A&G to discontinue, and prevent recurrence of those violations.

SAMS is a grassroots group with an office in Appalachia, VA whose primary purpose is stop the destruction of our communities by irresponsible surface coal mining, to improve the quality of life in our area, and to help rebuild sustainable communities [redacted]

Facts and Law

We recently received information indicating that A&G Coal Corporation has begun surface coal mining operations without a permit. We were told by several affected residents that they believed A & G Coal Corporation was beginning road preparation to the Ison Rock Ridge Surface Mine.

We believe that the mining operator has begun building roads and clearing the site in anticipation of mining. The mining company has applied for a permit (Application # 1003841) to mine the area it is currently disturbing, but that permit has not been issued. A&G's mining project is known as the Ison Rock Ridge Surface Mine near Appalachia, Virginia.

On June 12, 2007, based on this information, we informed the Virginia DMME that we believed A&G was conducting mining activities without a permit and that conducting those activities without a permit would violate the State and federal surface mining acts.

The letter to the DMME explained that pursuant to 4 VAC 25-130-700.5 (and 30 U.S.C. 1291(28)), "surface coal mining operations" includes clearing land on a proposed mining site, building roads on the proposed site or building roads on an adjacent site in connection with the proposed mine. We also explained that we believed A&G was conducting such activities without a permit. We also observed that, pursuant to 4 VAC 25-130-773.11, no person may conduct any surface coal mining operations without a permit.

Based on the law and on the facts as we understood them, we requested orally and in writing, pursuant to 4 VAC 25-130-842.12, that the Virginia DMME conduct an inspection of the proposed mining operation and the adjacent areas that are being disturbed in connection with the proposed mine and to issue a cessation order to the operator. 4 VAC 25-130-842.12 provides that any "person may request an inspection [of a surface mine] by furnishing to an authorized agent of the Director a signed written statement ... giving the authorized agent reason to believe that a violation, condition or practice referred to in 4 VAC 25-130-842.11(a) exists." We also requested that we be permitted to accompany DMME on the inspection.

DMME is required by 4 VAC 25-842.11 to immediately conduct an inspection when it has reason to believe that there "exists a violation of the Act" or that "there exists any condition, practice or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water sources." Such violations and conditions were fully explained in out letter of June 12, 2007. Mining without a permit would clearly violate the Act and would be expected to cause significant and imminent environmental harm.

After receipt of our letter, DMME scheduled an inspection of the proposed surface mining site on June 26, 2007. On that date members of Southern Appalachian Mountain Stewards assembled and anxiously awaited the opportunity to inspect the mining site. Remarkably, just before the inspection was set to begin, DMME refused to conduct the inspection. We were given no official reason for DMME's failure to carry out its duty to conduct the inspection and allow us to accompany it on the inspection. Based on statements made by a DMME representative, however, we believe that DMME may have refused to conduct the inspection because the surface mining permit had not yet been granted for the mine.

Whatever its reason, DMME's refusal to conduct the inspection violated its duties under the approved State program. If our information is correct, A&G is mining without a permit in direct violation of state and federal surface mining laws and is causing imminent and significant environmental harm. Our letter to DMME explaining these violations clearly triggered DMME's duty to conduct an inspection.

Relief

Mining without a permit constitutes a condition or practice posing imminent harm to land, air, or water resources, pursuant to 30 CFR 843.11(a)(2) and does not fall within the sole currently-applicable exception stated there (uninterrupted extension of permitted operations into an area for which a permit application is pending). Accordingly, based on DMME's failure to discharge its duties, we request that OSM issue a ten-day notice to DMME regarding (1) the violations identified above and (2) DMME's failure to conduct appropriate inspections and to issue a cessation order, pursuant to 30 C.F.R. 843.11, to A&G. We ask OSM to conduct an inspection of the mining site and to provide the requested relief as expeditiously as possible, in no event exceeding the time established by federal regulations for responding to citizen complaints.

We intend to exercise our right under 30 C.F.R. § 842.12(c) to accompany the federal inspector on any inspection conducted as a result of this request.

We have attached a copy of June 12 written request to DMME requesting an inspection and issuance of a cessation order. We look forward to hearing from you regarding the date and time of any such inspection.

Respectfully submitted,

Kathy R. Selvage

cc:

Roger L. Williams, AML Services Manager
Department of Mines, Minerals, and Energy
Division of Mined Land Reclamation
P.O. Drawer 900
Big Stone Gap, VA 24219

Company: A & G Coal Corporation **Permit No:** Application #1003841 **Date:** 7/02/07

Narrative:

OSM Big Stone Gap Area Office received a written complaint on 7/02/07, which alleges A & G Coal Corporation has disturbed permit application #1003841 prior to permit issuance. This surface mine permit is located on the Ison Rock Ridge area near Appalachia, Virginia. The application is in the third permit review cycle by DMLR.

The citizen alleges the company has built roads and is clearing the mine area in anticipation of the surface mining. The citizen also alleges DMLR has failed to conduct appropriate inspections related to this subject disturbance.

This written complaint with Ten Day Notice X07-130-052-001 was forwarded to DMLR on 7/03/07 for investigation. The alleged violation involves disturbing the permit area prior to obtaining a permit under 4 VAC 25-130-733.11(a).

Virginia Department of Mines Minerals and Energy

MEMORANDUM

TO: Ian B. Dye, OSMRE Program Specialist

FROM: Ernest J. Barker, Reclamation Service Manager

SUBJECT: Hand Delivered - Ten Day Notice

DATE: July 18, 2007

Ten Day Notice Number	**X07-130-052-001**
Company Name	**A & G Coal Corporation**
Permit Number	**Unknown**
Complaint	**Kathy R. Selvage**

This information was delivered to Office of Surface Mining by Ken Artrip on July 18, 2007, and was received by Constance A. Miller, on same said date.

ATTACHMENT

Ten Day Notice Number (TDN) X07-130-052-001 TV1
A & G Coal Corporation

ACTION

This TDN alleges A & G Coal Corporation has disturbed a mine site prior to approval of a surface mine permit by DMLR in violation of § 4VAC 25-130-773.11(a) of the Coal Surface Mining Reclamation Regulations of Virginia.

EVALUATION

The Division of Mined Land Reclamation (DMLR) has reviewed this TDN and supporting documentation. The OSMRE inspection report which accompanies this TDN states: *"This surface mine permit is located on the Ison Rock Ridge area near Appalachia Virginia."* There is not a coal surface mine permit on this area. An application for a coal surface mine permit (Application #1003841) was submitted to DMLR by A & G Coal Corporation (A & G) on March 28, 2007. This application is currently under review by DMLR.

The DMLR received a written complaint alleging, *"...the mining company has already started building roads and clearing land in anticipation of mining."* The DMLR conducted an immediate inspection pursuant to § 45.1-245 (A) of the Code of Virginia and found evidence of past logging, gas well/pipeline activity and two completed coal exploration notices (CEN4107 and CEN4043) on the area of Application #1003841.

According to the Virginia Department of Forestry (VDOF) personnel, several logging operations have been conducted in the area of Ison Rock Ridge Application #1003841 over the past 4 years. The most recent, conducted by C & S Logging (Wise 07508, notification #I-WIS-41-0130070752) commenced on February 1, 2007 and was completed on March 21, 2007.

The Department of Mines, Minerals and Energy's (DMME) Division of Oil and Gas (DGO) has several permitted, ongoing gas wells and pipelines in the area of Ison Rock Ridge application #1003841. The DGO regulates oil and gas well activities in Virginia and routinely inspects these operations. The DMME's Division of Mines (DM) is responsible for mine safety and regulates gas wells and pipelines as it pertains to underground and surface worker safety.

DMME recognizes there can be several regulated activities on the same land. DMLR coordinates closely with its sister agencies, DM and DGO, to resolve safety, environmental and jurisdictional issues associated with multiple regulated activities on the same property. The Division likewise coordinates with VDOF on issues of logging in proximity to coal surface mining. The DMLR and VDOF have developed guidelines to assist in regulating logging and mining activities.

A coal exploration notice (CEN4107) was filed with DMLR on this area on March 6, 2007 by A & G. The purpose of this exploration notice was to gather information for foundation

investigations for hollow fills during preparation of the Ison Rock Ridge permit application #1003841. This exploration activity was completed and the area reclaimed prior to April 25, 2007. Another coal exploration notice (CEN4043) was issued to A & G on June 19, 2006. Four exploratory core holes were drilled and grouted (sealed with concrete) under this notice. The area was regraded and revegetated in July of 2006. This exploration notice was released June 4, 2007.

FINDINGS

An investigation of the area of Ison Rock Ridge Surface Mine Application #1003841 on June 13, 2007 found evidence of past logging operations, ongoing oil and gas operations and two completed coal exploration notices in the area of the 1291.64 acre Ison Rock Ridge Application #1003841. This investigation did not reveal any evidence of illegal coal surface mining operations in the area of this application therefore a violation does not exist.

Note: The DMLR recognizes a citizen's right to accompany the inspector on an inspection of an alleged violation pursuant to § 4VAC25-130-842.12 of the Coal Surface Mining Reclamation Regulations. The complainant sent an e-mail note to DMLR on June 12, 2007 at 4:35 pm alleging illegal mining and requested to accompany the inspector on the inspection. This e-mail message was delivered to the Reclamation Services Section of DMLR at 1:55 pm on June 13. The DMLR inspector attempted to contact the complainant by phone prior to the inspection. The complainant could not be reached by telephone prior to the inspection on the afternoon of June 13, 2007 so the DMLR proceeded with an inspection of the area on that afternoon without the complainant. § 4VAC 25-130.842.11(a) requires that an inspection shall be conducted immediately when there is reason to believe based on information available that a violation of the Act, regulations, permit or exploration condition exists. The DMLR cannot delay an inspection in order to make arrangements with a citizen to accompany.

The DMLR met with and advised the complainant of its findings on June 26, 2007. The DMLR discussed provisions of the Ison Rock Ridge permit application pending. The DMLR further advised the complainant there was not any reason to conduct an additional inspection of this area as, based on all current information, there is no longer reason to believe a violation of the Act, regulations, permit or exploration condition exists.

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
710 Locust Street, Second Floor
Knoxville, TN 37902
JUL 25 2007

Butch Lambert, Director
Virginia Division of Mined Land Reclamation
P. O Drawer 900
Big Stone Gap, Virginia, 24219

Dear Mr. Lambert:

We have evaluated your response dated July 18, 2007, to Ten-Day Notice (TDN) No. X07-130-052-001 TV 1 and the underlying written complaint filed against A & G Coal Corporation, permit application number 1003841. The TDN alleged the company conducted surface mining activities prior to approval of the pending application.

Our office has determined that in response to the TDN, the Virginia Division of Mined Land Reclamation (DMLR) has shown good cause for not taking enforcement actions in this case base upon the following:

- DMLR addressed all known activities and disturbances in the area of the pending surface mine application in the Ison Rock Ridge location. No activities and disturbances were found to be related to the pending surface mining application. Activities included oil and gas well development, two completed and reclaimed coal exploration sites, and four years of logging operations.

Please contact Ian B. Dye, Jr., at 276/523-0001, if you have any questions regarding this determination.

Sincerely,

Tim L. Dieringer, Director
Knoxville Field Office

cc: Kathy R. Selvage

Barker, Ernie

From: Lambert, Butch
Sent: Thursday, July 26, 2007 9:30 AM
To: Barker, Ernie; Giles, Mike
Subject: FW: A & G Coal Corp TDN X07-130-052-001 (1) - re: DMLR's response & letter to DMLR signed by Tim L. Dieringer

FYI

-----Original Message-----
From: Ian B. Dye, JR [mailto:idye@osmre.gov]
Sent: Thursday, July 26, 2007 8:51 AM
To: Lambert, Butch
Subject: FW: A & G Coal Corp TDN X07-130-052-001 (1) - re: DMLR's response & letter to DMLR signed by Tim L. Dieringer

As requested.

From: Constance Miller
Sent: Thursday, July 26, 2007 7:27 AM
To: Brent Wahlquist; Michael Gauldin
Subject: A & G Coal Corp TDN X07-130-052-001 (1) - re: DMLR's response & letter to DMLR signed by Tim L. Dieringer

Thanks,
Constance A. Miller
Program Assistant
Big Stone Gap Area Office
276/523-0000, ext. 10
cmiller@osmre.gov

GEORGE F. WILLIS
DIRECTOR

DIVISIONS
ENERGY
GAS AND OIL
MINED LAND RECLAMATION
MINERAL MINING
MINERAL RESOURCES
MINES
ADMINISTRATION

COMMONWEALTH of VIRGINIA
Department of Mines, Minerals and Energy
Division of Mined Land Reclamation
P.O. Drawer 900
Big Stone Gap, VA 24219-0900
(276) 523-8100
FAX (276) 523-8163

Hand Delivered by Kathy Gentry

RECEIVED
JUL 2007
OSM BSGFO

NOTICE OF DMLR ACTION

CERTIFIED MAIL 7003 0500 0002 8116 3914

Ten Day Notice Number: X07-130-52-001 TV1

Company Name: A & G Coal Corporation

Permit Number: Not applicable County: Wise

Date Received by DMLR: July 9, 2007

The undersigned authorized representative having been apprised of a violation or an alleged violation is hereby notifying the Office of Surface Mining Reclamation and Enforcement (OSMRE) of the action taken to cause the said violation to be corrected or to show good cause for not taking action.

OSM Representative being notified: Tim Brehm, OSMRE
Address: 1941 Neely Road, Suite 201; Big Stone Gap, VA 24219

Action Taken or Reason for No action (Including Documentation):
See Attachment

Signature of Authorized Representative: Leslie D. Vance
Title: Reclamation Services Manager Date: 7/17/07
Certified Mail Receipt

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES, MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION
P.O. DRAWER 900, BIG STONE GAP, VA 24219
TELEPHONE: (276) 523-8198

KWA0002984

INSPECTION

COMPANY NAME	PERMIT	COMPLAINT	REPORT NUMBER
A & G COAL CORPORATION	900407Z	0700080	KWA0002984

NAME AND BUSINESS ADDRESS OF PERMITTEE	TYPE OF INSPECTION	REPORT TYPE
Jerry Wharton P. O. BOX 1010 WISE, VA 24293	COMPLAINT INSPT	ROUTINE

INSPECTION DATE	ARRIVAL	DEPARTURE	WEATHER
06/13/07	03:00 PM	04:30 PM	CLOUDY
06/26/07	08:30 AM	09:30 AM	CLOUDY

ACREAGE				
PERMITTED	DISTURBED	REGRADED	RECLAIMED	BONDED
0	1	0	0	0

COUNTY	OPERATION STATUS	LOCATION
WISE	NP - ACT/NOT PRDCNG	State Route 106, near Appalachia

INSPECTION BY	COPY OF REPORT
ARTRIP, KEN	Mailed - Mr. Jerry Wharton

THE FOLLOWING PERFORMANCE STANDARD(S) WERE INSPECTED AND FOUND TO BE IN COMPLIANCE:	
1 AO - AUTHORIZED TO OPERATE	

THE FOLLOWING PERFORMANCE STANDARD(S) WERE INSPECTED AND FOUND TO BE IN VIOLATION:	

COMMENTS :	PERMIT: 900407Z	REPORT: KWA0002984

This inspection report is in regard to Complaint No.0700080 concerning possible illegal mining activities.

MINING 100' - 300': N/A

GENERAL OBLIGATIONS. N/A

SUBSIDENCE CONTROL: N/A

SIGNS AND MARKERS: N/A

SEALING OF HOLES. N/A

TOPSOIL HANDLING: N/A

HYDROLOGIC SYSTEM/DRAINAGE CONTROL: N/A

BUFFER ZONE: N/A

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES, MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION
P.O. DRAWER 900, BIG STONE GAP, VA 24219
TELEPHONE: (276) 523-8198

KWA0002984

INSPECTION

USE OF EXPLOSIVES: N/A

DISPOSAL OF SPOIL (EXCESS): N/A

BACKFILLING AND GRADING: N/A

ACID & TOXIC MATERIAL: N/A

SPOIL DOWNSLOPE: N/A

REVEGETATION: N/A

HAULROADS. N/A

RECLAMATION TAX: N/A

AUTHORIZATION TO OPERATE: The operator has submitted Ison Rock Ridge Surface Mine, Application No.1003841, for approval of a Surface Coal Mining Permit in the Appalachia area of Wise County. This application was submitted to the Division in March 2007. It involves a total acreage area of 1291.64 acres located in the Callahan, Preacher and Looney Creek watersheds. The application is currently in the review process.

On June 13, 2007, the Division received a complaint thru the DMLR Info Mailbox Account from a complainant stating that the operator has already started coal mining operations without a permit. They further stated that the mining operator has begun building roads and clearing the site in anticipation of mining. It was also requested that after it was determined that surface mining was proceeding without a permit, that the operator be order to cease such operations and to begin reclamation activities on the site.

On the afternoon of June 13, 2007 after the complaint was received, the proposed mining area was field reviewed by DMLR inspectors. All four entrances to the area were checked for mining traffic activity and most of the 1291acre area was field reviewed. The area contains logging and gas well activities Also two approved Coal Exploration Notices are located in the area of this application but no illegal mining activities were located.

I talked to the complainant concerning the area that they were concerned about. It was stated that their information was from a third party and that their sources need to be checked and that they will call me and a meeting will be scheduled for early next week to review the site in question.

On June 26, 2007, Mike Giles and I met with Ms. Selvage and Ryan Dingus to discuss the Ison Rock Ridge Surface Mine Application #1003841 in Appalachia. They were advised that we could discuss the proposed permit but could not make a field visit. Mike advised Ms. Selvage that DMLR made an investigation of her initial complaint on the afternoon of June 13, 2007 and found no mining activities being conduced on this proposed application. Further it was explained that since there was no mining activities found on the proposed application and there was not a surface mine permit on the area, DMLR did not believe there was any rationale for conducting an additional inspection.

Mike and I reviewed the Application maps and discussed provisions of the plan with them. They said that they may drive by some of the proposed area but did not plan to field review the area. The meeting ended at approximately 9:20AM.

OTHER: N/A

COMMENTS:
Conducted a partial inspection on the above checked performance standards.

DMLR-ENF-044S
9/98

Page 2 of 3

Printed: 07/26/07

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF MINES, MINERALS AND ENERGY
DIVISION OF MINED LAND RECLAMATION
P.O. DRAWER 900, BIG STONE GAP, VA 24219
TELEPHONE: (276) 523-8198

KWA0002984

INSPECTION

This 1291.64acre area is submitted under the Ison Rock Ridge Surface Mine, Application No.1003841. It is currently in the review phase at the DMLR office. It is located in the Callahan, Proacher and Looney Creek Watersheds in Wise County.

No violations were noted.

If there are any questions, please contact this inspector.

STATEMENT OF STEPHANIE R. TIMMERMEYER, SECRETARY, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, CHARLESTON, WEST VIRGINIA

Ms. TIMMERMEYER. Mr. Chairman and members of the Committee, thank you for the opportunity to speak on behalf of West Virginia to commemorate this, the 30th anniversary of SMCRA.

To say that this legislation is important to the Mountain State would be an understatement. Fortunately, as mining practices have evolved, so has SMCRA. To illustrate that point, in my travels here I have brought two permits. This permit was issued in 1977. This

permit was signed this week. Both allow for surface mining on similar acreage.

This permit basically just outlines the boundaries of the mining area and the number of acres to be mined. This one is clearly far more comprehensive. It includes a surface water runoff analysis, a community impact statement, baseline water quality data, a stability analysis, a sediment control plan, among many other additions. Clearly, SMCRA and our correlating state regulations have come a long way since 1977.

Our agency continues to work every day to find new ways to reduce mining's impact on the environment and keep folks in business. Both mining and environmental protection are big business in our state.

West Virginia has had a long-time relationship with the coal industry. In 1939, long before SMCRA was contemplated, West Virginia was the first state in the Nation to enact environmental laws to regulate coal mining. As the coal boom continued and as companies walked away from sites, leaving a legacy of environmental damage, an energetic freshman Congressman from West Virginia helped craft and build support for landmark legislation that would require responsible mining and reclamation across the country.

SMCRA created Federal oversight for mining activities, and empowered the states to protect human health and the environment. I am humbled by the great strength of character and great leadership that you showed, Mr. Chairman, to take such a bold step as the member of a coal state's delegation. Your actions helped propel West Virginia into the forefront as a leader in environmental protection issues.

Through SMCRA and a solid state mining regulatory program, coal operators are far more responsible in mining activities. Planned reclamation has become a given in coal mining today. Industry has progressed from claiming that SMCRA and any changes to it would put them out of business, to vying for reclamation awards and showcasing successful reclamation sites.

Too often that wasn't the case in years past. West Virginia is still riddled with pre-law mine sites that continue to pollute our streams and pose safety hazards to residents. Thanks to SMCRA, West Virginia has a means to tackle that problem.

I won't spend a lot of time on this issue, because I know others will address it later, but I could talk all day about how important the recent AML fund reauthorization is to West Virginia. I will just quickly note that West Virginia Governor Joe Manchin has announced that $58 million of the nearly $1 billion that West Virginia will receive will go to create valuable water infrastructure to the old mining communities that need it the most.

The industry, government, and citizens have become more sophisticated since 1977. Decisions on mining matters are far more deliberative and comprehensive. Now more than ever, permit decisions are inclusive of the public. The DEP prides itself in its progressive approach to public participation. Individuals can subscribe to an online email notification system. Citizens are in our DEP offices every day reviewing permit files to make informed comments on draft permits. Public hearings are commonplace. And the agency makes itself available for question-and-answer sessions and citizen

inspections. Without the groundwork of SMCRA, this may not have been possible.

Post-mining land uses are a very important component of SMCRA. Due in part to the steep topography of West Virginia, many new commercial developments are on previously mined and reclaimed land, particularly in the southern coal fields. Shopping malls, schools, wood product plants, golf courses, and athletic complexes have sprung up on old mine sites.

One of the most significant projects in the state is the King Coal Highway, which will enable residents of once-isolated communities to travel farther in shorter timeframes. The highway will spur economic development along the route, providing the critical travel infrastructure that West Virginia needs. It is by no means the D.C. Beltway, but it sure is a far cry from the twisting, winding, narrow roads that we West Virginians are used to.

West Virginia Governor Joe Manchin realizes the importance of post-mining land use requirements and the development opportunities that they present. An Executive Order is being drafted that sets in motion a framework for future industrial, commercial, and agricultural projects that will tap into the experience of the state's economic development and science leaders.

Coal won't be here forever, so West Virginia is looking to diversify its economic development and growth options, so that it can keep its residents employed and living in the Mountain State.

I hope that SMCRA will continue to evolve and mature, in order to take into consideration the states' infrastructure needs, environmental protection needs, and development needs on mine lands that might otherwise lie dormant. Instead of a legacy of problems, today's legacy is this: Thanks to SMCRA, mining companies are held to a high standard. They have recognized that there is an inherent wealth in a community's heritage and well-being.

Mining is also a part of our state's social fabric, and it provides an integral part of West Virginia's well-being in culture, as well as the nation's economy. With forward-thinking legislators like Congressman Rahall and our Governor, Joe Manchin, West Virginia will continue to lead in mining and reclamation regulation, while seeking out new ways to provide energy and fuel the nation's economy.

Thank you for providing this opportunity to speak. It is truly an honor to be able to provide West Virginia's perspective on this issue.

[The prepared statement of Ms. Timmermeyer follows:]

Statement of Stephanie R. Timmermeyer, Cabinet Secretary, West Virginia Department of Environmental Protection

Mr. Chairman and members of the committee,

Thank you for the opportunity to speak on behalf of West Virginia to commemorate the 30th anniversary of the Surface Mining Control and Reclamation Act of 1977. The measure has been hugely important to the Mountain State as coal mining practices have evolved over the past 30 years. Natural resource extraction and regulation has quite a history in West Virginia.

In 1939, West Virginia was the first state in the nation to enact environmental laws to regulate coal mining. The legislation required that companies obtain a permit, post a bond and reclaim the land. The environmental protection movement for mineral extraction was born.

Over the next few decades, coal mining became more prevalent, and the boom of the northern underground coal mines prompted companies to explore the southern

coalfields and burrow underground for the resource that would propel the United States into the forefront of industrial production and electricity supply.

An incredible amount of wealth was leaving West Virginia. Mining companies not only took the valuable coal out of the state, but also destroyed the heritage and fabric of communities. They often left nothing behind but unsafe sites, open mine portals and dead streams. Despite early legislation, little was being done to stem the tide of destruction from mining. During World War II, the demand for energy peaked, and millions of tons of coal were mined quickly. Before long, more than 102,000 acres were disturbed with no reclamation.

That prompted West Virginia legislators to again take action to strengthen the surface mining law. In 1959, lawmakers required vegetation on disturbed areas, though the law was fairly weak, and it did little to fix the reclamation problem.

A new surface mining law was enacted in 1967 that gave what we now call the West Virginia Department of Environmental Protection the responsibility for all phases of mining. The 1967 act was considered to be one of the toughest surface mining laws in the U.S. The act required prospecting permits, surface mining permit fees, bonds for disturbed acres, basic preplanning responsibilities, and monthly inspections. All of these requirements were precursors to our modern-day rules and regulations governing mining operations, and, I might say, a foreshadowing of what was to come in 1977.

In that decade to come, West Virginia was in the limelight for a couple of reasons. In 1972, a coal dam burst on Buffalo Creek, killing 125 people and wreaking havoc on families and communities in the wake of the rushing water. That incident put a renewed focus on the mining industry through the creation of dam safety laws.

Momentum continued to build, and an energetic freshman congressman from West Virginia helped craft and build support for landmark legislation that would require responsible mining and reclamation across the country. The birth of SMCRA, thanks to Congressman Rahall and his colleagues, has leveled the playing field for mining companies through federal oversight and it empowered states to protect human health and the environment. It took incredible leadership for Congressman Rahall to take such a bold step as part of a major coal state's delegation, and it thrust West Virginia into the forefront again as a leader in environmental protection issues.

No law has had a bigger impact on mining in West Virginia than SMCRA. Above all, SMCRA greatly reduced mining's impacts through minimum requirements and an emphasis on reclamation. No longer could coal companies take the valuable coal and leave behind a legacy of acid mine drainage and dangerous land formations. Although there are still impacts from mining, the practice is now carefully planned and permitted with extensive scientific, regulatory and public input.

To illustrate that point, I have brought, on my travels here, two permits. This permit was issued in 1977. This permit was signed yesterday. Both allow for surface mining on similar acreage. This permit basically outlines the boundaries of the mining area and the number of acres to be mined. This one is far more comprehensive. It includes a surface water runoff analysis, a community impact statement, baseline water quality data, a stability analysis, and a sediment control plan, and many other additions.

Clearly, SMCRA and our correlating state regulations have come a long way since 1977. Our agency works every day to find new ways to reduce mining's impact on the environment and keep folks in business. Both mining and environmental protection are big business in our state.

The DEP combines the administration of the SMCRA and Clean Water Act 401 and 402 programs to regulate active mining. The integrated program for coal mining in West Virginia processed permitting transactions and inspection/enforcement activities at over 1,900 permitted sites that together produced 159 million tons of coal in 2006. That resource generated over 90% of the state's electricity consumption and helped fuel a state economy that supplies products and services essential to the welfare of the nation.

Through SMCRA and a solid state mining regulatory program, coal operators are far more responsible in mining activities. Planned land reclamation has become a given in coal mining today. Industry has progressed from claiming that SMCRA and any changes to it would put it out of business to vying for reclamation awards and showcasing successful reclamation sites.

Too often that wasn't the case in years past. West Virginia is still riddled with pre-law mine sites that continue to pollute our streams and pose safety hazards to residents. Thanks to SMCRA, West Virginia has a means to tackle the problem. The Abandoned Mine Land Fund created by SMCRA uses industry dollars to fund mine cleanup projects from old rogue operations.

In West Virginia, the Abandoned Mine Land program has eliminated and reclaimed tens of thousands of acres of abandoned mine sites by abating hazards and restoring land and water to beneficial uses. Many miles of streams, such as the Blackwater and Middle Fork rivers have been restored to viable fisheries. Public water systems have been installed where past mining destroyed potable water supplies. The recent reauthorization of the program, thanks in part to the leadership of West Virginia's congressional delegation, will provide the opportunity to accelerate the program. Earlier this year, Governor Manchin announced that $58 million of the nearly $1 billion West Virginia will receive will go to creating valuable water infrastructure to the old mining communities that need it most.

The West Virginia AML program has received in excess of $617 million over the past 30 years to achieve the mission of the program. In the past 30 years, DEP eliminated 49 miles of highwalls, sealed 2,688 portals, abated 439 acres of residential and urban subsidence areas, and eliminated 739 impoundments, all of which posed significant public health and safety hazards. Through the AML program, there are over 12,215 West Virginia families, churches, schools, and businesses that have clean, safe, and reliable drinking water. Since 1988, more than 779 emergency projects have been completed, in some cases saving the lives of people at risk of an impending impoundment failure or landslide. Despite all of our work, there is much more to do. West Virginia has documented over $1.8 billion in reclamation needs in the Office of Surface Mining's inventory.

The West Virginia Special Reclamation Fund to reclaim coal mined lands abandoned after 1977 is another example of how SMCRA has led the regulated community to take responsibility for environmental legacy costs. The fund, in part, is based on the early landmark West Virginia statute that required funds be paid by the operator to address land reclamation and water pollution. The program is funded by forfeited bonds, civil penalties and a reclamation tax on mined coal. Since its inception, DEP's Office of Special Reclamation has reclaimed 1,592 bond forfeited coal-mining permits totaling 26,691 acres at a cost of over $101 million. In addition, DEP has constructed and maintains 105 water treatment sites at a capital cost of $17 million, and an additional $26 million in operating and maintenance costs.

The permitting process under SMCRA has afforded opportunities to avoid and minimize potential problems, thus providing some direction for mining operations. For example, improvements in the prediction and prevention for modeling acid mine drainage has contributed to the fact that since 1999, only 3.2% of permits have developed acid mine drainage. This represents a continual downward trend since the passage of SMCRA.

The realization of ownership and control requirements through SMCRA and the corresponding state programs and maintenance of nationwide databases like the Applicant Violator System imposed accountability and made possible the removal and blocking of irresponsible operators. A challenge is maintaining the level of accountability requirements in light of the changes in ownership structures of coal companies, especially the multitude of ownership forms (e.g. investment groups, limited liability corporations) and bankruptcy law protections used by some coal operators.

SMCRA has been effective in preventing and remediating offsite impacts that can occur with coal mining. In West Virginia, water replacement is now the rule rather than the exception. Also, a blasting program insisted upon in SMCRA provides neighbors of mining operations with protections in advance of blasting and avenues for redress in the event of damages.

The industry, government and citizens have become more sophisticated since 1977. Decisions on mining matters are far more deliberative and comprehensive. Now, more than ever before, permit decisions are inclusive of public comment and participation. The DEP prides itself in its progressive approach to public participation. Individuals can subscribe to an online e-mail notification system to see public notices for any county in the state. Citizens are in our DEP offices every day reviewing permit files and arming themselves with information to make informed comments on draft permits or to provide testimony in mining permit appeals. Public hearings are commonplace, and the agency attempts to make itself available for question and answer sessions and citizen inspections. Without the groundwork of SMCRA, this may not have been possible.

The permitting process, in fact, has become a planning tool for companies and communities. The SMCRA requirement to reclaim mined lands and return them to uses equal or better than those which existed before mining has become an important economic development component for West Virginia.

In 2006, approximately 75% of all surface mine applications approved in West Virginia set forth forestland as the post mining land use. This equates to approximately 8,000 acres. Over the past three years, 6 million seedlings were planted on

mined lands. This sets the stage for a future viable forestry industry in the years to come.

Due in part to the steep topography of West Virginia, many new commercial developments are on previously mined and reclaimed land. Particularly in the southern coalfields, shopping malls, schools, wood products plants, golf courses, and athletic complexes have sprung up on old mine sites. One of the biggest up and coming projects in the state is the King Coal Highway, constructed as a post mining land use. The highway will enable residents of once isolated communities to travel farther in shorter time frames. The highway will spur commercial development along the route, providing the critical travel infrastructure West Virginia needs. It is by no means the Washington, D.C. beltway, but it sure is a far cry from the twisting, winding, narrow roads West Virginians are used to.

West Virginia Governor Joe Manchin realizes the importance of post mining land use requirements and the development opportunities they present. An executive order is being drafted that sets in motion a framework for future industrial, commercial and agricultural projects that will tap into the know-how the state's economic development and science leaders. Coal won't be here forever, so West Virginia is looking to diversify its economic development and growth options so that it can keep its residents employed and living in the Mountain State. I hope that SMCRA will continue to evolve in order to take into consideration states' infrastructure, environmental protection, and development needs on mined lands that might otherwise lie dormant.

It has taken decades of science, expertise and diplomacy to get where we are today in mining and regulating coal. The changes have been drastic and have led to a dramatic improvement from the old days of digging coal and leaving behind a legacy of problems.

Instead of a legacy of problems, today's legacy is this—thanks to SMCRA, mining companies are held to a high standard. They have recognized that there is an inherent wealth in a community's heritage and well being. Mining is also a part of the state's social fabric, and it provides an integral part of the nation's economy and West Virginia's well being and culture. With forward-thinking legislators like Congressman Rahall and our Governor, Joe Manchin, West Virginia will continue to lead in mining and reclamation regulation while seeking out new ways to provide energy and fuel the nation's economy.

Thank you for providing this opportunity to speak. It is truly an honor to be able to provide West Virginia's perspective on such important legislation.

The CHAIRMAN. Mr. Husted.

STATEMENT OF JOHN HUSTED, DEPUTY CHIEF, DIVISION OF MINERAL RESOURCES MANAGEMENT, OHIO DEPARTMENT OF NATURAL RESOURCES, COLUMBUS, OHIO

Mr. HUSTED. Greetings, Mr. Chairman and members of the Committee. I am the Deputy Chief of the Ohio Division of Mineral Resource Management, and also the President of the National Association of Abandoned Mine Land Programs. And I have been working with Title IV and Title V programs since 1979.

I am submitting the testimony on the behalf of the National Association of Abandoned Mine Land Programs. The Association is an organization consisting of 30 states and Indian tribes with a history of coal mining and coal mining-related hazards, which is overseen by the Office of Surface Mining Reclamation and Enforcement.

I would like to present the member states' and tribes' views and sentiments related to the implementation of Title IV AML reclamation program under SMCRA.

Since the enactment of SMCRA, the AML program has reclaimed thousands of dangerous sites left by abandoned coal mines, resulting in increased safety for millions of Americans. Unfortunately, three billion priority-one and two problems still threaten the public's safety and remain unreclaimed.

The Association is extremely pleased over the passage of the 2006 amendments to SMCRA. The 15-year extension, coupled with the increased off-budget funding, will provide the states and tribes with the ability to be able to carry out the remaining AML reclamation work.

Included in your testimony is a copy of the AML booklet called Safeguarding, Reclaiming, and Restoring, which highlights the various AML projects across the United States that have protected the public's health and safety. It is important to remember that the AML program is, first and foremost, designed to protect the public's health and safety. The majority of the state and tribal AML projects specifically correct AML features that threaten someone's personal safety or welfare.

While state and tribal AML programs do complete significant projects that benefit the environment, the primary focus has been on eliminating health and safety hazards first. The OSM inventory of completed work reflects this task.

The following quotes and excerpts are from the Association members that I believe are representative of many of the members' views, and are intended to address the effectiveness of Title IV of SMCRA.

Number one, comments from Montana's AML program. From the Montana perspective, the AML program has been a huge success. Montana's program is a success from the aspect of protecting human health and safety, and protecting the environment. From the program management perspective, Montana's AML program is a success because of the manner in which the AML program is managed by OSM. Montana's experience with OSM's oversight in the AML program is one of collaborative assistance that focuses on accomplishments, the goals of the AML.

In addition, OSM sponsors training through the National Technical Training Program in subjects such as subsidence control, mine fire abatement, mine hydrology, and project management.

Comments from North Dakota's AML program. Overall, I believe the AML program has been very successful in identifying abandoned mine sites and eliminating safety hazards associated with many of them. As you know, much more AML work remains to be done, and in most states, reauthorization of the program will allow most of the remaining work to be completed over the next 15 years.

However, for the minimum program states, one of the failures has been the lack of full funding for minimum program states over the past 15 years.

In closing, as President of the Association, I would like to commend OSM for their efforts to work with the states and tribes in the rulemaking process for the implementation of the 2006 amendments to SMCRA.

Several issues still have not been resolved; thus, the states and tribes have serious concerns about how effectively the 2006 amendments will be implemented.

Number one. Funding for minimum program states. The minimum programs should receive $3 million per fiscal year, commencing in 2008, and not wait until Fiscal Year 2010.

Number two. Distribution of payments from the U.S. Treasury. The states and tribes would like the option of receiving the pay-

ments using the current grant system, or payments directly by the Treasurer, similar to mineral royalties paid to states under the Mineral Leasing Act.

Number three. Use of unappropriated state's share balances. The states and tribes assert that these monies should also be available for non-coal reclamation, and for the 30 percent AMD set-aside.

These issues are very important, and we request the Committee to urge OSM to address these problems, as we believe they will lay the foundation for successful implementation for the AML program for the next 15 years.

The Association would like to submit for the record a copy of a May 2007 letter to OSM which provides significant detail and rationale behind our concerns over these listed topics and other important issues.

Thank you for the opportunity to provide testimony, and your strong support for the AML program.

[The prepared statement of Mr. Husted follows:]

Statement of John F. Husted, President, National Association of Abandoned Mine Land Programs, and Deputy Chief, Ohio Department of Natural Resources, Division of Mineral Resources Management, Columbus, Ohio

Greetings Mr. Chairman and Members of the Committee. My name is John F. Husted and I am the Deputy Chief of the Ohio Department of Natural Resources, Division of Mineral Resources Management and also the President of the National Association of Abandoned Mine Land Programs (NAAMLP). I started my career in 1979 with the State of Ohio and have worked exclusively in Title IV and Title V programs under the Surface Mining Control and Reclamation Act of 1977. I have represented the Ohio Department of Natural Resources as a member of the NAAMLP since 1993 and have been proudly serving as President of the Association since September 2006.

I am submitting this testimony on behalf of the NAAMLP. The NAAMLP is a tax-exempt organization consisting of 30 states and Indian tribes with a history of coal mining and coal mine related hazards. These states and tribes are responsible for 99.5 percent of the Nation's coal production. All of the states and tribes within the NAAMLP administer abandoned mine land (AML) reclamation programs funded and overseen by the Office of Surface Mining Reclamation and Enforcement (OSM) pursuant to Title IV of SMCRA, P.L. 95-87.

The Association appreciates the opportunity to participate in this oversight hearing on "The Surface Mining Control and Reclamation Act of 1977: A 30th Anniversary Review". I would like to present the member states' and tribes' views and sentiments related to implementation of the Abandoned Mine Land Reclamation Program (Title IV) under SMCRA.

Since the enactment of the SMCRA by Congress in 1977, the AML program has reclaimed thousands of dangerous sites left by abandoned coal mines, resulting in increased safety for millions of Americans. Specifically, more than 285,000 acres of abandoned coal mine sites have been reclaimed through $3.5 billion in grants (administration and construction) to states and tribes under the AML program. This means hazards associated with more than 27,000 open mine portals and shafts, 2.9 million feet of dangerous highwalls, and 16,000 acres of dangerous piles and embankments have been eliminated and the land reclaimed. Despite these impressive accomplishments, $3 billion Priority 1 and 2 problems threaten public health and safety and remain unreclaimed. These hazardous sites require safeguarding by the states and tribes AML programs.

The Association is extremely pleased over the passage of the 2006 Amendments to SMCRA. The 15-year extension coupled with increased funding will provide the states and tribes with the ability to carry out the remaining AML reclamation work. It is the intention of the states and tribes to focus on the protection of the public health and safety to ensure restoration in the coalfields of America. The Association would also like to thank the Congress for reauthorizing the AML Program and for taking the AML funding to states and tribes "off-budget". With the funding off-budget, this will finally allow the states and tribes to make staffing decisions and in turn begin planning for long range design and reclamation activities. Included with our testimony is a copy of an AML booklet called "Safeguarding, Reclaiming, Restoring"

for your review. The booklet was developed by the Association and OSM to highlight the various AML projects across the United States that have protected the public's health and safety.

It is important to remember that the AML program is first and foremost designed to protect public health and safety. The majority of state and tribal AML projects specifically correct AML features that threaten someone's personal safety or welfare. While state and tribal AML programs do complete significant projects that benefit the environment, the primary focus has been on eliminating health and safety hazards first. The OSM inventory of completed work reflects this fact.

This committee has asked the NAAMLP to comment on the 30th Anniversary Review of SMCRA. The following quotes and excerpts are from some of the Association members that I believe are representative of many of the members views and are intended to address the effectiveness of Title IV of SMCRA:

1. Montana: "From the Montana perspective the Abandoned Mine Reclamation Program under Title IV of SMCRA has been a huge success. Montana's AML program was approved in 1980 and the program has had a high approval rating ever since. Montana's program is a success from the aspect of protecting human health and safety, protecting the environment, and from the perspective of creating jobs and putting people to work. Acceptance of the AML program has run high because AML results in on the ground accomplishments that are immediately visually apparent.

From the program management perspective Montana's AML program is a success because of the manner in which the Abandoned Mined Lands program is managed by Office of Surface Mining. Montana's experience with OSM oversight in the AML program is one of collaborative assistance that focuses on accomplishing the goals of AML. OSM provides the oversight and assistance necessary to keep the AML program on track without creating unnecessary or confusing paperwork or reports.

OSM provides important training in the areas of computer software and modeling geographic information systems, and data systems. This focused training gets staff trained using software packages that would not be available through State computer systems. In addition, OSM sponsors training through their National Technical Training Program in subjects such as subsidence control, mine fire abatement, mine hydrology and project management. This specialized training is just not available from other sources and without it Montana AML would not have the necessary problem solving tools.

2. North Dakota: "Overall, I believe the AML program has been very successful in identifying abandoned mine sites and eliminating safety hazards associated with many of them. As you know, much more AML work remains to be done in most states and re-authorization of the program will allow most of this remaining work to be completed over the next 15 years. However, for the minimum program states, one of the failures has been the lack of full funding for the minimum program states over the past 15 years. SMCRA amendments in 1992 set the minimum program funding level at 2 million dollars per year, but Congress typically appropriated only enough funds for 1.5 million per year. If the other 0.5 million dollars had been appropriated each year, the backlog of AML work in these states would be much less and hazards would have been eliminated sooner and at lower costs. Since there is nothing that can be done about past actions, we shouldn't dwell too much on that and move forward instead. With re-authorization now in place, it's time for OSM to ensure that funding for minimum program states is at the 3 million dollars per year authorized in that legislation. The increased funding to that level for the minimum program states needs to begin in FY 2008."

In closing, I would like to commend OSM for their efforts to work with the states and tribes in the rulemaking process for the implementation of the 2006 Amendments to SMCRA. OSM has spent considerable time and effort meeting and responding to questions and concerns from the Association regarding rule development. Although much has been done to address problems identified by the states and tribes, there are still significant shortcomings that need to be addressed. Several issues still have not been resolved, thus the states and tribes have serious concerns about how effectively the 2006 Amendments to SMCRA will be implemented. The issues are:

1. Funding for Minimum Program States.

- The Minimum Program States are Alaska, Arkansas, Iowa, Kansas, Maryland, Missouri, and Oklahoma.
- OSM has indicated that the minimum program states will not receive the full $3 million allocation until FY 2010. The states believe that this is a misinterpretation by OSM and that the minimum programs should receive $3 million per year beginning in FY 2008.

2. Use of Grant Mechanism to Distribute Payments from the U.S. Treasury for both the prior unappropriated state/tribal balances and payments in lieu of future state and tribal share to certified states and tribes.

- The states and tribes would like the option of receiving the Treasury payment by the current grant process or by direct payment from the Treasury similar to mineral royalties paid to states under the Mineral Leasing Act.
- The states and tribes want flexibility and discretion with regard to the types of mechanisms that are available for distributing and expending Treasury payments.

3. Use of Unappropriated State Share Balances for Noncoal Reclamation and AMD Set-Aside.

- In its most recent interpretation of the 2006 Amendments, OSM has stated that the funds returned to the states and tribes from the unappropriated state share balance cannot be used for noncoal reclamation or for the 30 percent AMD set-aside.
- Pursuant to Section 411(h)(1) of the 2006 Amendments, the states and tribes assert that these moneys should also be available for noncoal reclamation under Section 409 and for the 30 percent AMD set-aside. There is nothing in the new law that would preclude this interpretation. Policy and practice over the past 30 years confirm it.

These three items represent some of the unresolved issues between OSM and the States and Tribes on the 2006 Amendments to SMCRA. These issues are very important and we request that this Committee urge OSM to address these problems, as we believe they will lay the foundation for successful implementation of the AML Program for the next 15 years. The Association can provide this committee a copy of a letter to OSM dated May 21, 2007 which provides significant detail and rationale behind our concerns over these listed topics and other important issues. We can also provide a copy of the response letter from OSM dated June 14, 2007.

Thank you for the opportunity to submit this statement and provide comments. Please contact me if the NAAMLP can provide more information or assist the Committee in any way.

[NOTE: The AML booklet entitled "Safeguarding, Reclaiming, Restoring" has been retained in the Committee's official files.]

May 21, 2007

Brent Wahlquist
Acting Director
Office of Surface Mining
1951 Constitution Avenue, N.W.
Washington, DC 20240

Dear Mr. Wahlquist:

This letter represents the comments of the National Association of Abandoned Mine Land Programs (NAAMLP) and the Interstate Mining Compact Commission (IMCC) regarding draft rules (proposed and interim final) developed by the Office of Surface Mining (OSM) to implement the provisions of the Surface Mining Control and Reclamation Act (SMCRA) Amendments of 2006 (P.L. 109-432). OSM provided both the NAAMLP and IMCC with copies of the draft rules in April and also attended a meeting of both organizations on May 2 and 3 in Indianapolis to discuss the rules. We appreciate the opportunity to submit comments on the draft rules as OSM prepares to move forward with their promulgation later this year.

There are several key sections of the draft rules that we will address in these comments, as noted below. However there are a few over-arching issues related to the interpretation of the new law that we will discuss first, as they set the stage for some of our recommended changes to the rules. All of these issues grow out of OSM's "Major Policy Issues" paper that was also shared with the states in April.

I. GENERAL OVERVIEW COMMENTS

Use of Grant Mechanism to Distribute Payments from the U.S. Treasury

Pursuant to the 2006 Amendments to SMCRA, two new types of payments from the U.S. Treasury are established: 1) distribution of the prior unappropriated state/tribal share balances over a seven year period (Section 41 l(h)(l)) and 2) payments in lieu of future state/tribal shares formerly paid out of the AML Trust Fund pursuant to section 401(g)(l) (Section 41 l(h)(2)). Section 402(i)(2) requires the Secretary

of the Treasury to transfer to the Secretary of the Interior "such sums as are necessary to pay the amount" described above, but no specific payment mechanism is prescribed. OSM prefers to distribute these payments via grants to states and tribes, based on its reading of the law and on past practice, rather than via direct distribution of cash from the Treasury. The states and tribes posit that the new law does not directly address this matter and therefore the Secretary has the discretion to design a payment mechanism that meets the needs of the states and tribes. In line with this discretionary authority, the states and tribes prefer an approach that will provide them with immediate access to those moneys that are due and owing from the Treasury. This can be accomplished through a traditional grant process for those who desire the "protection" and guidance that such a process affords these monetary distributions. However, there is also flexibility to design either a grant or a direct payment mechanism that provides more unrestricted and immediate access to these moneys for states who desire maximum discretion with regard to the use of these moneys in line with the language in Section 41 l(h)(l)(D)(i) and (ii). In the latter circumstance, the state legislatures will exercise their fiduciary responsibility to insure that the funds are spent legally and appropriately in accordance with the dictates of the 2006 Amendments and state contracting law. Federal audits will also provide a measure of scrutiny and review of project selection and expenditures. There are also other mechanisms available for tracking and facilitating these payments, one example being the management of mineral royalties paid to states under the Mineral Leasing Act and another being a general statement of work detailing how the money will be spent. The states and tribes therefore urge OSM to incorporate significant flexibility and discretion with regard to the types of mechanisms that are available for distributing and expending Treasury payments for both the prior unappropriated state/tribal balances and payments in lieu of future state/tribal share to certified states and tribes.

Funding for Minimum Program States

The 2006 Amendments include several provisions that govern the award of grant funds by OSM to states. Section 402(g) has three paragraphs that bear on that topic. Section 402(g)(I) directs that; "50 percent of the reclamation fees collected annually in any State" be distributed to that state. Under section 402(g)(5)(A), "[t]he Secretary shall allocate 60 percent of the amount in the fund after making the allocation referred to in paragraph (1)" for additional grants to states. And section 402(g)(8) states that "In making funds available under this title, the Secretary shall ensure that the grant awards total *not less than* $3,000,000 annually to each State and each Indian tribe..." (emphasis added). This latter provision provides OSM the justification for insuring annual minimum program grant funding in excess of the base $3 million level as long as OSM does not contribute more than $3 million from its own discretionary funds.

Section 401 of the bill also has relevant provisions. Sections 401(f)(l) and (2) direct OSM to distribute grant funds to states annually, including the amount needed for the adjustment under section 402(g)(8) (i.e., the "minimum program" adjustment up to $3.0 million). Section 401(f)(3) has a similar provision:

> "IN GENERAL.—...for each fiscal year, of the amount to be distributed to States and Indian tribes pursuant to paragraph (2), the Secretary shall distribute—
>
> (i) the amounts allocated under paragraph (1) of section 402(g), the amounts allocated under paragraph (5) of section 402(g), and any amount reallocated under section 41 l(h)(3) in accordance with section 41 l(h)(2), for grants to States and Indian tribes under section 402(g)(5); and
>
> (ii) the amounts allocated under section 402(g) (8)."

This again makes it clear that the legislation requires OSM to provide minimum program states at least $3.0 million annually, under section 402(g)(8), commencing October 1, 2007.

In its restrictive reading of the bill, OSM depends upon a single provision in section 401(f)(5)(B) to reduce the amounts of annual grants to minimum program states from the minimum $3.0 million annual required grant amount. That provision reads (with emphasis added):

> "(B) EXCEPTIONS.—*Notwithstanding paragraph (3),* the amount distributed under this subsection for the first 4 fiscal years beginning on and after

October 1, 2007, shall be equal to the following percentage of the amount otherwise required to be distributed:

(i) 50 percent in Fiscal Year 2008.
(ii) 50 percent in Fiscal Year 2009.
(iii) 75 percent in Fiscal Year 2010.
(iv) 75 percent in Fiscal Year 2011."

OSM's reliance on this provision ignores the fact that by its own terms (i.e. the "notwithstanding" phrase), it only overrides the requirements of section 401(f)(3). Yet other provisions of the bill independently require the distribution of the minimum amount of $3.0 million. See sections 401(f)(l) and (2) and section 402(g)(8). The provision cited by OSM does not override the clear requirements of those other parts of the bill.

The phase-in schedule of section 401(f)(5) only applies to such additional funds as might otherwise be provided by OSM to the minimum program states above the guaranteed distributions required elsewhere in the statute. This means that OSM cannot contribute more than $1.5 million in additional funding to each minimum program state in Fiscal Years 2008 and 2009, and not over $2.3 million in additional funding in each of Fiscal Years 2010 and 2011, and not over $3.0 million in additional funding in each subsequent year through Fiscal Year 2024.

This debate goes much deeper than the interpretations of the two sections mentioned above. Congressional intent and history in the passage of P.L. 95-87, the original "Surface Mining Control and Reclamation Act of 1977," deserves merit in the interpretation debate. In the 95th Congress, the late Morris K. Udall (considered by many as the "father" of P.L. 95-87) worked tirelessly with government agencies, industry, and other organizations to make sure this law became a reality. With regard to the reclamation of abandoned mine lands, Title IV of P.L. 95-87 has been the guiding light for both OSMRE and the States/Tribes for almost 30 years. During this time, AML funding issues have overshadowed Congressman Udall's intent as outlined in Section 403 of P.L. 95-87 "Objectives of the Fund." Section 403 set specific priorities as to the expenditure of moneys from the AML fund. The number one priority is "the protection of public health, safety, and property from extreme danger of adverse effects of coal mining practices," It is significant that the Surface Mining Control and mandated annual $2 million was "budget deficits." Then under the Clinton administration, there was a "budget surplus," but the annual allocation remained at $1.5 million. For the last 13 years, Minimum Program States have been critically underfunded in respect to the number of Priority 1 and Priority 2 AML hazards that need to be reclaimed. Respective Administration budgets and Congressional budgets continued to hold the AML Fund "hostage," while unappropriated balances continued to rise.

In early December 2006, much to the surprise of both OSMRE and States/Tribes, the 2006 Amendments took AML funding off budget. No longer would Congress appropriate AML funds on an annual basis. The pressure was now on OSMRE to develop a method(s) to distribute the AML funds to States and Tribes. OSMRE began to develop future funding projections under the new law. Since December 2006, OSMRE has distributed four different funding charts. With each successive chart, the funding numbers for the States and Tribes would change. But in all four of these OSMRE charts, there was one constant—the Minimum Program States (Alaska, Arkansas, Iowa, Kansas, Maryland, Missouri, and Oklahoma) would receive no funding increases for FY 2008 and FY 2009. Not until FY 2012 would Minimum Program States receive an annual $3 million.

In the last OSMRE Funding distribution chart (Chart 4), the following funding increases are reflected when comparing FY 2007 AML funding to FY 2008 AML funding, as well as the amount of Priority 1 and Priority 2 coal hazards in the AML Inventory for each state:

	Funding Increases	Amount of Hazards
Alabama	96%	$49.1 million
Colorado	175%	$24.9 million
Illinois	45%	$55 million
Indiana	138%	$12.3 million
Kentucky	124%	$338.5 million
New Mexico	187%	$3.2 million
North Dakota	93%	$41.6 million
Ohio	65%	$100 million
Pennsylvania	29%	$1,016.9 billion
Utah	147%	$4.9 million
Virginia	115%	$ 104.1 million
West Virginia	103 %	*$790,6* million

Reclamation Act Amendments of 2006 removed the words "general welfare" from the original wording of Section 403(1). In their infinite wisdom, the 109th Congress wanted to further strengthen Section 403(1) by placing a special emphasis on public health, safety, and property.

There are no specific provisions in P.L. 95-87 or the 2006 Amendments that discuss in detail the specific State/Tribe AML funding formulas that embrace historic coal production, state share (present coal production), and federal discretionary expenses. However, in the 2006 Amendments Congress did single out states and tribes specifically in Section 402(g)(8)(A) stating, "In making funds available under this title, the Secretary shall ensure that the grant awards total not less than $3,000,000 annually to each State and each Indian Tribe having an approved abandoned mine reclamation program pursuant to section 405 and eligible land and water pursuant to Section 404, so long as an allocation of funds to the State or tribe is necessary to achieve the priorities stated in paragraphs (1) and (2) of section 403(a)." The fact that Congress has always (and in the 2006 Amendments continues to) dedicate a section of the law to states and tribes traditionally known as those with "Minimum Programs" solidifies the Congressional intent that these states and tribes annually receive not less than $3,000,000.

In the late 1980s the Mid-Continent Coal Coalition was formed because the Minimum Program States and Tribes had several hundreds of millions of dollars worth of Priority 1 and Priority 2 AML hazards that posed, and continue to pose, a very high public health and safety risk. AML funding had fallen to an annual $1 million level that would not allow the efficient operation of a State/Tribal AML Program. This Coalition gathered Congressional support through letters, resolutions, testimony at Congressional committee hearings, etc. As a result, the budget reconciliation bill passed by the 101st Congress in the fall of 1990 required that the Secretary allocate annually not less than $2,000,000 to Minimum Program States and Tribes. The passage of this bill inl990 was definitive proof that Congress supported an increase in funding for the Minimum Program States and Tribes.

For three years (FY1992, FY 1993, and FY 1994) the Minimum Program States received $2 million annually. Since that time the Minimum Program States have been limited to an annual allocation of only $1.5 million. The primary reason given for not allocating the statutorily could be used to help fund the Minimum Programs at the annual $3 million level Furthermore, in its News Release of February 5, 2007, OSM noted that it has off-budget funds in its FY 2008 budget that could fully fund AML minimum programs at not less that the $3 million level. This money was provided to OSM for the purpose of, and should be used for, fully funding the minimum programs at the $3 million level. The bottom line is the Minimum Programs have been ignored for too many years. With the passage of P.L. 109-432, Congress has sent a message to OSMRE that Minimum Programs should be funded at an annual rate of $3 million, starting with the FY 2008 budget. The sad part of this impasse is the fact that those living near or visiting these Priority 1 and Priority 2 AML sites are exposed on a daily basis to the possibility of death and/or injury.

Congress gave OSMRE the authority to develop the AML funding distribution numbers for the states and tribes. The NAAMLP and IMCC urge that during the development of proposed rules and regulations for the 2006 Surface Mining Control and Reclamation Act Amendments, OSMRE "look outside the box" and consider the real reason that Title IV was enacted almost 30 years ago.

Use of Unappropriated State Share Balances for Noncoal Reclamation and AMD Set-Aside

Since the inception of SMCRA in 1977 and the approval of state/tribal AML programs in the early 1980's, the states and tribes have been allowed to use their state share distributions under section 402(g)(l) of the AML Trust Fund for high priority noncoal reclamation projects pursuant to section 409 of SMCRA and to calculate the set-aside for acid mine drainage (AMD) projects. Under the new amendments, states and tribes will receive their unappropriated balances in seven equal payments beginning in FY 2008. In its most recent interpretation of the 2006 Amendments, OSM has stated that these moneys cannot be used for noncoal reclamation or for the 30% AMD set-aside. OSM also initially stated that the historic coal distribution to non-certified states and tribes would also not be available for noncoal reclamation, but the agency appears to have relented on this issue and will allow these moneys to be used for both noncoal reclamation and the 30% AMD set-aside. With regard to the unappropriated state and tribal share balances that will be distributed pursuant to Section 41 l(h)(l) of the 2006 Amendments, the states and tribes assert that these moneys should also be available for noncoal reclamation under section 409 and for the 30% AMD.

Louisiana	200 %	$0.00
Montana	229 %	$8.5 million
Texas	238 %	$800,000
Wyoming	269 %	$25.8 million
Crow Tribe	260 %	$500,000
Hopi Tribe	250 %	$0.00
Navajo Nation	215%	$0.00

It should be noted that the term "minimum program" does not refer to lack of AML hazards that a state or tribe has to address, but rather with the lack of funding being generated by active coal mines within the state or tribe for purposes of remediating hazards associated with past coal mining. For example, Oklahoma has an AML inventory of priority 1 and 2 sites that will cost between $125 and 130 million to reclaim using today's cost figures. Kansas has an AML inventory of priority 1 and 2 sites that will cost over $200 million to remediate. However, funds generated by current coal mining activities in these two states generate around $25,000 annually for Kansas and around $100,000 annually for Oklahoma. For perspective, states like Kentucky and West Virginia receive between $6,800,000 and $8,300,000 annually to perform remediation of hazardous AML sites. Interestingly (and in some respects, unfortunately), Oklahoma has an AML inventory of priority 1 and 2 hazards that will cost more to remediate than 14 of the states and tribes listed above and Kansas has an AML inventory of priority 1 and 2 hazards that will cost more to remediate than 16 of the above-listed states and tribes. Therefore, even though the "minimum program" states may get minimum funding, they certainly have their fair share of AML priority 1 and 2 hazards.

From December 2006 through February 2007, OSMRE continued to change their funding distribution charts, using factors such as historic coal production, state share fund balances, and present coal production. During this three month process, each time a new chart was developed OSMRE failed to put emphasis on the real problem; How much is the public affected by Priority 1 and Priority 2 AML hazards? Ignoring AML project sites that are an eminent danger to the health and safety of the public is not what Congress intended.

OSMRE can find the funds in their FY 2008 budget to fond AML Minimum Programs. OSMRE is phasing out the Clean Streams Initiative Program and the Watershed Cooperative Agreements Program. This money set-aside. There is nothing in the new law that would preclude this interpretation. Policy and practice over the past 30 years confirm it. The unappropriated state and tribal share balances consist of past moneys collected from coal producers in these states and tribes that were never distributed due to restricted and under-funded appropriations. This money has always been "colored" as state/tribal share money, available for expenditure in accordance with the provisions of SMCRA and now 30 years of experience. The fact that the money is being paid out of Treasury funds does not change the "color" or operation of that money—it has been and will always be state/tribal share money allocated pursuant to section 402(g)(l) of SMCRA.

OSM's new interpretation of SMCRA based on the 2006 Amendments is without support in the law when read as a whole. In interpreting the meaning of section 411, the entire statute must be read in context. Section 403 (which OSM points to)

is modified by Section 409, which provides for the expenditure of AML funds at any priority 1 or 2 site, regardless of the commodity that was mined. Section 409(b) indicates that the 50% state share (from 402(g)(l)) and the historic production distribution (402(g)(5)) can be used for noncoal reclamation. If Congress had intended to limit the use of the unappropriated state/tribal share balances (or historic production distributions) that are now finally being returned pursuant to section 41 l(h)(l), it could have easily done so. However, no changes were made in section 411 to accomplish this. Nor was Section 409 amended in any way.

OSM's new interpretation is also a dangerous policy choice. OSM claims that once a state has completed all of its coal projects, it can then use all of its grant funds for noncoal projects. This will require that states spend years working on high-cost, low-priority coal projects that present little threat to public health and safety, while numerous highly hazardous abandoned noncoal mines remain unattended. In many western states, the AML programs have employed their AML grants to protect people and property threatened by noncoal abandoned mines. In New Mexico, for instance, the state estimates that over 10,000 mine openings remain. The overwhelming majority of these openings are at abandoned noncoal mines. All of the fatalities at abandoned mines in New Mexico over the past few decades have occurred at noncoal mines. With urban growth pushing into undeveloped areas and recreational uses increasing, the danger to public health and safety from abandoned noncoal mines throughout the country is increasing

Much of the above reasoning also holds true for the availability of the unappropriated balances for purposes of calculating the 30% set-aside for AMD abatement. Again, this work falls within the clear purposes of section 403 of SMCRA and thus any type of restriction on the use of these funds for AMD remediation is inappropriate. Section 403(g)(6)(B)(ii)(I) establishes and defines the use of AMD set-aside funds. That section states that a qualified hydrologic unit destined for AML abatement must have land and water that "...include any of the priorities described in Section 403." Obviously, this passage provides a clear nexus to section 403 of the Act. The 2006 Amendments at section 41 l(h)(l)(D)(ii) state that non-certified states must use amounts provided from Treasury funds in place of the unappropriated balances for "...purposes described in Section 403." Again, a clear nexus to section 403 is stated. Actually, the references in sections 402 and 411 to section 403 are identical. Therefore AMD abatement is a purpose under section 403 and Treasury funds should not be artificially excluded for use in the set-aside for AMD. Finally, we should note that each appropriation bill over the past several years has included language that supports the use of funds made available under Title IV of SMCRA for the purpose of environmental restoration related to treatment or abatement of AMD without restriction. Based on the above, the NAAMLP and IMCC request that OSM reconsider its interpretation on the use of unappropriated state and tribal share balances for noncoal reclamation and the AMD set-aside. Adjustments to the draft rules based on these arguments appear below.

Reduction of the Treasury l/7th payments for the unappropriated balance by the amount of the export tax lawsuit loss

The relevant citations:

411(h)(l)(A)(i)ofP.L. 109-432

In General—Notwithstanding section 401(f)(3)(B), from funds referred to in section 402(i)(2), the secretary shall make payments to States or Indian tribes for the amount due for the aggregate unappropriated amount to the State or Indian tribe under subparagraph (A) or (B) of section 402(g)(l)

41l(h)(l)(B) of P.L. 109 432 (emphasis added)

Amount Due—In this paragraph, the term "amount due" means the unappropriated amount allocated to a State or Indian Tribe *before October 1, 2007* under subparagraph (A) or (B) of section 402(g)(l).

As a part of our discussion on the unappropriated balance, OSM has stated that should the export tax lawsuit ultimately be lost on appeal, the loss shall be paid out of the trust fund and the l/7th payments out of the Treasury to each State or Tribe shall be reduced by the like amounts each State or Tribe owed for the lawsuit.

Section 41l(h)(l)(B) of P.L. 109-432 states that the amount due each State or Tribe is the amount allocated to each State or Tribe (State Share) before October 1, 2007. Unless the export tax lawsuit is resolved prior to October 1, 2007, then the amount paid out of the Treasury in l/7th installments to each State or Tribe for the unappropriated balance should not be reduced due to the lawsuit. Although the trust fund would ultimately be reduced by the amount of the export tax lawsuit loss, the payments out of the Treasury should remain unchanged since the amount the payments will be based upon will be established as of October 1, 2007. Further, we

do find any language in P.L. 109-432 that can be interpreted to give OSM the authority to reduce payments from the Treasury for the unappropriated balance.

Effective Date of In-Iieu Payments

There has been some confusion about when in-lieu payments from the U.S. Treasury begin under the 2006 Amendments. OSM has stated that they begin in FY 2009, and that payments to certified states and tribes of their 50% share in FY 2008 are made from the AML Trust Fund. Our reading of the 2006 Amendments is that the in-lieu payments from the Treasury begin immediately in FY 2008. The relevant citations are:

Section 401 (f)(3)(B) of P.L. 109-432:

(B) EXCLUSION. "Beginning on October 1, 2007, certified States shall be ineligible to receive amounts under section 402(g)(l).

Section 411 (h)(l)(B & C) of P.L. 109-432:

(B) AMOUNT DUE.—In this paragraph, the term "amount due" means the unappropriated amount allocated to a State or Indian tribe before October 1, 2007 under subparagraph (A) or (B) of section 402(g)(l).

(C) SHEDULE.—Payments under subparagraph (A) shall be made in 7 equal annual installments, beginning with Fiscal Year 2008.

Section 411 (h)(2)(A) of P.L. 109-432:

> (A) IN GENERAL.—Notwithstanding section 401(f)(3)(B), from funds referred to in section 402(i)(2), the Secretary shall pay to each certified state or Indian tribe an amount equal to the sum of the aggregate unappropriated amount allocated on or after October 12, 2007, to the certified State or Indian tribe under subparagraph (A) or (B) of section 402(g)(l).

OSM has advanced the following explanation to support its current declared intention to pay state share funds to the certified states under section 402 (g)(l) in FY 2008 (emphasis added):

"Certified states and tribes will receive distributions under section 401(f) only in FY 2008 because the bill adds a new section 401(f)(3)(B), which provides that certified states and tribes are ineligible to receive their state-share or tribal-share allocations with respect to fees collected after FY 2007. *However, FY 2008 distributions consist of FY 2007 fee collections, so certified states and tribes are eligible to receive 50% of their state or tribal share allocation of fees collected for that year.*

Beginning with FY 2009, certified states and tribes will receive annual payments from the Treasury in lieu of the amount of fee collections during the previous year that would otherwise have been allocated to their state or tribal share accounts in the AML fund in the absence of new section 401(f)(3)(B) of SMCRA. Section 4U(h)(2) ofSMCRA. [1]

Section 401(f)(3)(B) of P.L. 109-432 states that beginning October 1, 2007, certified states shall not be paid under 402(g)(l). This provision is a complete exclusion. It prohibits certified States or Indian tribes from receiving grants funded by the reclamation fee effective October 1, 2007. There is no language in this section to support an interpretation that a certified State or Indian Tribe can receive after October 1, 2007 grants funded by reclamation fees collected prior to October 1, 2007.

In order to support the position that the exclusion established by Section 401(f)(3)(B) does not apply to grants issued in Fiscal Year 2008 if funded by reclamation fees collected during Fiscal Year 2007, OSM staff have explained that the term "received" as used in Section 401(f)(3)(B) means "allocated". This interpretation is contrary to the normal and ordinary usage of the term "received" and is contrary to standard principles of statutory construction. Unless the context clearly indicates otherwise, or the word has been given a specific definition, words in a statute are to be given their normal meaning.

Relying on this interpretation, OSM has developed a distribution chart dated February 22, 2007, showing that $41.6 million will be paid to the certified States or Indian tribes under 402(g)(l) in FY 2008. This distribution represents FY 2007 fee collections. This approach is correct for distributions to non-certified states as required by 401(f)(2) and (3). However, Section 401(f)(3)(B) prohibits certified States or Indian tribes from receiving payments of funds under 401(f) beginning on October 1, 2007. The fees collected and allocated in FY 2007 are to be included in the amounts due to the states that are allocated but not appropriated under Section 41 l(h)(l)(B). These funds are then paid over seven years, beginning in FY 2008 under 41 l(h)(l)(C).

---

[1] Major Provisions of P.L. 109-432: SMCR.A Amendments Act of 2006. page 3. Distributed to NAAMLP members at its business meeting February 28 - March 1. 2007.

The effect of this misinterpretation of Section 401(f)(3)(B) and 41 l(h)(l)(B) is that $41.6 million would be paid to certified States or Indian tribes with fee collections instead of Treasury funds as required by Section 41 l(h)(l)(A)(i). The funds so paid will then not be available to be reallocated as historic share funds available for grants under Section 41 l(h)(4)(A). Furthermore, the interest that should be earned annually on this $41.6 million and paid to the Combined Benefit fund would not be earned and available to be paid.

The draft language in the Proposed and the Interim-final regulations on this subject is consistent with the statutory language in P.L. 109-432 and so does not need to be changed. However OSM's interpretation of P.L. 109-432 is flawed. Based on the above arguments, the NAAMLP and IMCC urge OSM to revise the proposed AML funding distribution chart to show that:

(a) no state share funds are distributed to the certified States or Indian tribes in FY 2008; but,
(b) the $41.6 million should then be included in the calculation of the amount due to certified States and Indian tribes under Section 411(h)(1)(B).

Adjustments to the Grants Process

There is a fair amount of concern by the states and tribes about how the grants process will work under the 2006 Amendments. With the increased amount of money that will be flowing to the states, it will be incumbent on both OSM and the states and tribes to be particularly sensitive to the impacts on the grants process—especially with regard to the length of grants, rollovers, tracking of grant amount (especially by account), recapture, and paperwork reduction. We assert that the timing is ripe for revisiting the existing simplified grants process to consider additional streamlining and simplification. There is some concern that the 2006 Amendments could unnecessarily complicate the paperwork demands associated with annual grants, especially if we are required to track various kinds of moneys that are received. It will be particularly important to clarify that moneys are "expended" once they are obligated, encumbered or otherwise committed for projects. Even with this, deobligation could become a problem if we are unable to roll grants over from year to year. We understand that OSM will be considering various adjustments to the Federal Assistance Manual and to its AML directives and we request an opportunity to review those revisions once they are available. This may present an ideal opportunity for further clarifications to address the above concerns.

Annual Distribution Charts

It will be critical for the states and tribes to receive the annual distribution charts for AML grants as soon as practicable after the beginning of each fiscal year (i.e. by no later than November 15). This will be particularly true in the first few years as the states and tribes attempt to forecast how the distribution will impact their respective programs. In this regard, we have attached a chart that, in simplified terms, demonstrates our understanding of the gross distribution formula as presented by OSM to date. It should be noted that the states and tribes do not agree with this distribution formula, as indicated by our comments on the proposed and interim rules. In fact, we have argued in these comments for various adjustments to the formula and to the use of the distributed funds based on our reading of the new 2006 AML amendments. Nonetheless, we would appreciate OSM's comments on our attempt to capture OSM's distribution formula under their interpretation of the 2006 Amendments and any additional explanations (flowcharts) that OSM can share with us regarding their interpretation of the distribution formula under the new law.

Training

It will be very important for the states and tribes to receive the necessary training to implement the provisions of the new rules, once they are in place—especially as they impact the grants process. We urge OSM to keep this in mind as they consider implementation plans for the future.

Preamble Language

We recognize that one mechanism OSM has available to clarify certain aspects of the proposed and interim final rules is through the use of preamble language. We would encourage OSM to do so. One example is the need to adjust the priority matrix contained in the Federal Assistance Manual (FAM) to reflect regional differences in land use patterns. Given that much of SMCRA's history was predicated on land use patterns and experience with hazards in the Eastern United States, there are unintentional gaps that fail to recognize the uniqueness of circumstances in other regions of the country. Whereas residents of Eastern states, for instance, may have residences or other structures that were built adjacent to known hazards,

residents of Western states (and non-resident recreational users of Western lands) are exposed to AML features that consist of largely unknown hazards that are equally, if not more, dangerous than "known" features. Thus, as we consider what would be defined as an "extreme danger", we need to be cognizant of the fact that unknown hazards in remote or rural areas can be even more dangerous than known dangers as the unsuspecting public encroaches on these areas through occasional use or through urban sprawl. Recognizing the exposure of the populace to the hazards associated with abandoned mine sites will assist the states, tribes and the federal government in fully implementing the objectives of the AML program under SMCRA.

II. PROPOSED REVISIONS TO OSM'S DRAFT PROPOSED AND INTERIM RULES

The NAAMLP and IMCC recommend the following changes to OSM's draft proposed and interim final rules based on the above commentary.

Section 870.5—Definitions

"Adjacent"—change to read as follows:

"*Adjacent* means adjoining, in proximity to or contiguous with eligible lands and waters."

Justification: OSM's draft rule implies that a Priority 1 or 2 project must be undertaken in order for a Priority 3 project to be considered "adjacent to" the Priority 1 or 2 problem. This is not what the law requires. It is not a matter of priority; it is a matter of proximity. As long as the Priority 3 project is geographically connected to the Priority 1 or 2 site, the test is satisfied. Furthermore, OSM's proposed language conflicts with statutory provisions in sections 403(a)(l)(B)(ii) and (2)(B)(ii) that eligible lands include those that "are adjacent to a site *that has been or will be remediated.* (emphasis added). In its proposed language, OSM is implying that for a priority 3 feature to be eligible, it has to be reclaimed in order to access or remediate the priority 1 or 2 feature. This simply cannot be the case if the priority 1 or 2 feature has already been reclaimed or may be so in the future, as anticipated by the 2006 amendments. We recommend use of the common dictionary definition of "adjacent". We also oppose the concept of tying the definition to a monetary determination. There is nothing in the law to support this criterion and we believe it would be difficult to determine and apply. The use of a proximity criterion will also allow us to take into consideration public rights of way, roads, etc, that may be present at or near the site. Finally, to define the term otherwise would be to severely limit the number and types of Priority 3 projects that could be addressed, which is contrary to the intent of the law.

"In conjunction with"—change to read as follows:

"In conjunction with means reclamation of priority 3 features in phases or through a combination of contracting and construction with priority 1 and/or 2 features."

Justification: It is important to recognize that Priority 3 work cannot only be done in conjunction with a Priority 1 or 2 feature through a combined contracting or construction effort, but in phases of construction with a Priority 1 or 2 project, especially where the project is particularly large or the AML program is small (as with the minimum program states). We recommend deletion of the phrase "would have provided significant savings to the AML fund" for the same reason we recommend deletion of the last sentence in the definition: these terms are elusive and difficult to define and quantify. The law does not specify this type of monetary criterion and it would be challenging to implement. We assert that it is best to focus on the administrative aspects of project work, which are easier to define. Finally, to define the term otherwise would be to severely limit the number and types of Priority 3 projects that could be addressed, which is contrary to the intent of the law.

"Qualified Hydrologic Unit"—change to read as follow:

Change the word "and" to "or" between subparagraphs (b)(l) and (2), as in the existing regulations.

Justification: We realize that OSM's new definition is consistent with the statutory language, but actual practice over the past 25 years has been that hydrologic units are defined as containing lands and waters that are either eligible OR the subject of bond forfeitures, but not both. To define the term otherwise would be to severely limit the scope of this important provision of the law. With the new emphasis on allowing states to set aside upwards of 30% of their AML funds for the abatement of acid mine drainage projects, to limit the definition in this way would emasculate the purposes and intent of the program.

Section 872.1 l(b)(l)—Abandoned Mine Reclamation Fund

Delete section 872.1 l(b)(4)(ii)(E).

Justification: Based on the arguments articulated above with respect to the use of the states' and tribes' unappropriated share balances, this section should be deleted. There is no basis to restrict the use of these moneys for noncoal reclamation.

Section 872.13—Other Treasury Funds for Abandoned Mine Reclamation Programs

Change the reference in the introductory phrase of subparagraphs (a) and (b) to read: "872.1 l(b)(l)(vi) and (b)(2)(vi)"—NOT "(vii)".

Change Subparagraph (a) and (b) to read as follows: "Notwithstanding Sec. 872.1 l(b)(l)(vi) and (b)(2)(vi), from funds in the Treasury not otherwise appropriated and transferred to the Secretary of the Interior pursuant to section 402(i)(2) of the Act, effective October 1, 2007, OSM shall make payments to States and Indian tribes...." Also, in subparagraph (a), change the reference to "prior balance funds" to "prior balance payments".

Change section 872.13(a)(3) to read as follows: "States and Indian tribes may apply for and receive these annual installments in grants, following the provision of Section 886. Unless a certified State or Indian tribe specifically requests that OSM disburse funds due the State or Tribe in whole or in part through a grant or grants, payments referred to in Section 41 l(h)(l)(A) (prior balance payments) shall be made in one lump sum payment to the State or Tribe no later than 90 days after the start of the federal fiscal year in which the payment is due."

Change section 872.13(b)(3) as follows: delete the current language and insert the following: "Unless a certified State or Indian tribe specifically requests that funds be disbursed through a grant or grants following the provisions of section 886, payments referred to in Section 41 l(h)(2)(A) (in lieu of payments) shall be made annually in one lump sum payment to the State or Tribe no later than 90 days after the end of the federal fiscal year in which the collections are made."

Change section 872.1 l(b)(4) by striking the word "shall" and inserting "may".

Justification: All of these changes are intended to reflect the discretionary authority vested in the Secretary to make payments to states and tribes through either grants or direct payments, depending on the preference and needs of the respective state or tribe. Section 411 (h) uses the term "payments" which appears to embrace a wider degree of flexibility regarding distribution of funds other than just grants. See also the discussion on this topic above.

Change subparagraph 872.13(a)(5) to read as follows:

"(5) States and Indian tribes that are not certified under section 41 l(a) of the Act shall use any amounts available under this paragraph to achieve the priorities described in sections 403(a)(l),(2) and (3) of the Act, for water supply restoration under sections 403(b)(l) and (2) of the Act, for AMD abatement under section 402(g)(6) and for noncoal reclamation under section 409 of the Act."

Justification: The 2006 Amendments at Section 41 l(h)(l)(D)(ii) state that the unappropriated prior state and tribal share funds must be used as described at section 403. In interpreting the meaning of sections 411 and 403, the entire statute must be read in context. When doing so, it is clear that section 403 is modified by section 409. Section 409 provides for expenditure of funds at any priority 1 or 2 site, regardless of commodity mined. Furthermore, section 409(b) states that the 50% state and tribal share can be used for noncoal reclamation (referencing section 402(g)). The unappropriated state and tribal shares are in fact the balance of the 50% shares referenced in section 402(g) that have been held in abeyance over the years. There should be little ambiguity that this money is available for noncoal reclamation (as well as for the 30% AMD set-aside). If Congress had intended to somehow qualify or restrict the use of the unappropriated balances, it could easily have done so in section 411. However, it failed to do so and thus we can only assume that the traditional funding mechanism that has prevailed over the past 30 years remains intact. Such an interpretation is also consistent with the purposes and objectives of Title IV of SMCRA, which are to protect citizens from the adverse impacts of past mining practices—both coal and noncoal.

Add a new subparagraph 872.13(b)(5) as follows: "Payments referred to in section 872.13(b)(3) to certified States and Tribes shall be used with priority given to abandoned coal mine reclamation needs until the State or Tribe and OSM determine that abandoned coal mine reclamation is substantially complete. Thereafter, current in lieu payments will be used for purposes established by the state legislature or tribal council."

Justification: The law and draft rules are unclear as to how certified states and tribes may use current in lieu funds when the state or tribe has completed abandoned coal mine reclamation. Current in lieu funds in excess of those required for completion of abandoned coal mine reclamation should be used for purposes estab-

lished by the state legislature or tribal council with priority given to addressing the impacts of mineral development.

Section 873.12—Future set-aside program criteria

In subparagraph (a), change the last phrase to read as follows: "...are expended by the State or Indian tribe solely to achieve the priorities stated in Sections 403(a) and 409 of the Act, 30 U.S.C. 1233 and 1239, after September 30, 1995".

Justification: This adjustment is needed to clarify that funds set-aside by the states prior to December 12, 2006 are available for both coal and noncoal work.

Section 875.15—Reclamation priorities for noncoal program.

Delete Subparagraphs (c) - (f)-

Justification: These subparagraphs must be deleted in order to be consistent with the new provisions in the 2006 Amendments at section 41 l(h)(l)(D)(i) regarding use of AML funds by certified states and tribes. Pursuant to this section of the 2006 Amendments, certified states and tribes are allowed to use their AML funds "for the purposes established by the State legislature or tribal council of the Indian tribe, with priority given for addressing the impacts of mineral development". Thus those provisions in OSM's existing regulations that provide for a concurrence role by the OSM Director are no longer applicable and should be removed. Furthermore, as we argue above, the payment mechanism that will attend the distribution of these funds will likely be different than what has occurred in the past, and therefore the provisions in subparagraphs (c), (e) and (f) will likely no longer be applicable.

Section 876—Acid Mine Drainage Treatment and Abatement Program

Section 876.12 Eligibility—add the following: "or up to 30% of the funds received pursuant to Section 412 l(h)(l) of the Act."

Justification: this language clarifies that up to 30% of the prior unappropriated state and tribal share balances distributed form Treasury funds may be deposited into state and tribal AMD set-aside funds.

Section 886.12(b)—Coverage and amount of grants.

Change subparagraph (b) to read: "Grants shall be approved for reclamation of eligible lands and water in accordance with sections 404 and 411 of the Act and 30 CFR 874.12, 875.12 and 875.14, and in accordance with the priorities stated in sections 403, 409 and 411 of the Act...."

Justification: We have added section 409 as part of the priority reference to be consistent with the above changes regarding noncoal reclamation and to specifically reference noncoal lands.

Section 886.13 (b)—Grant period

Change subparagraph (b) to read as follows: "The Director shall approve a grant period on the basis of the information contained in the grant application. The grant period should normally be for 3 years, and may be extended. Grants of funds distributed in Fiscal Years 2008, 2009 and 2010 shall be awarded for 5 years."

Justification: We understand that OSM will not require specific projects to be listed in the grant application, so this phrase has been removed. We also Understand that OSM will allow extensions of the normal 3 year grant period and that those extensions may be for more than one year, which we believe is appropriate. Finally, we assert that the 2006 Amendments specifically call for a 5 year grant period for Fiscal Years 2008-2010 and that this is a mandatory requirement.

One further note: it does not appear that the section 41 l(h)(l) Treasury funds are subject to any of the grant period timelines established by section 402(g)(l)(D). Nor does there appear to be any authority in the Act to establish timelines for the use of 411 funds. Thus, an annual distribution payment in the full amount due under section 411 should be available as an option for grants to each state/tribe, which in turn could be deposited into a separate state account and considered state funds and used without restriction for any section 403 priority (including AMD abatement).

Section 886.16(a)—Grant agreements.

Change subparagraph (a) to read as follows: "OSM shall prepare a grant agreement that includes a general statement of the types of work to be covered by the grant."

Justification: We assert that the grant agreement need only contain a general statement of the types of work to be covered by the grant, not a listing of specific projects. This change is intended to clarify that intent.

Section 886.26—Unused Funds

Delete subsections 886.26 (a)(iii) and (iv). Also, delete subparagraph 886.26(b) and add the following: "Deobligation requirements do not apply to certified States and Tribes."

Justification: No treasury payments should be subject to deobligation requirements. OSM should work with the states and tribes to insure that funds do not revert back to the Treasury. With maximum flexibility in designing payment protocols and with appropriate grant periods and applicable requirements, there should be no need for reversion of these payments, especially if OSM and the states/tribes are working together to closely monitor the situation.

We appreciate the opportunity to submit these comments and trust that OSM will give them serious consideration as the agency moves forward with the development of the proposed and interim final rules. We would welcome the opportunity to meet with OSM to further discuss the draft rules, should you so desire. Should you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,

John Husted
President, NAAMLP

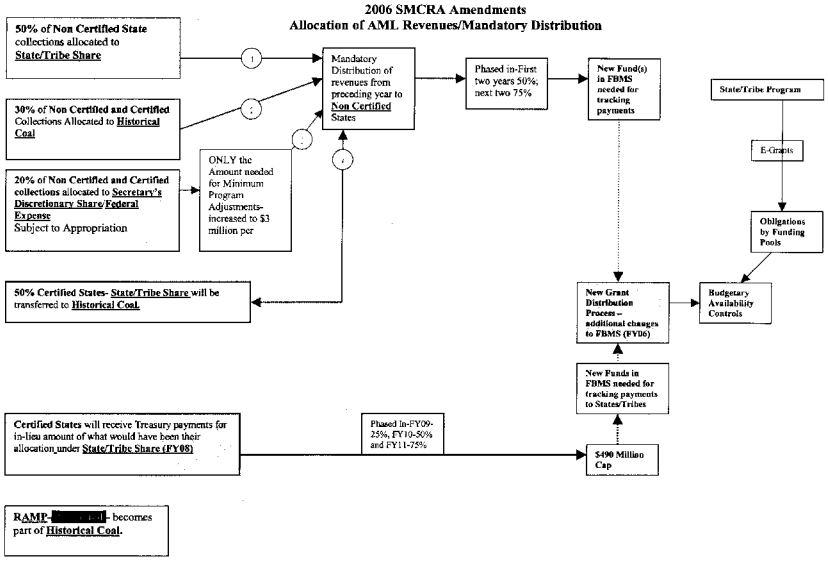
Gregory E. Conrad
Executive Director, IMCC

Attachment

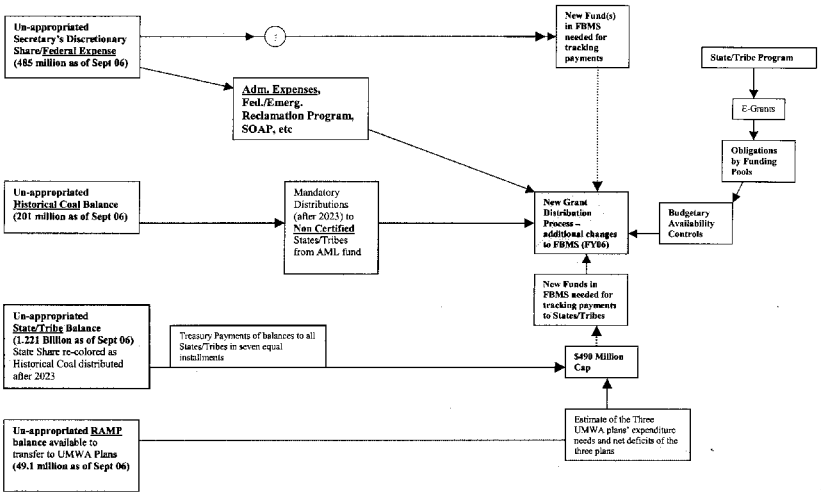
cc: NAAMLP Member States and Tribes
IMCC Commissioners

OSM OVERVIEW OF AML FUNDING PER 2006 AMENDMENTS

	State Share (Non-Certified)	Historic Share (Non-certified) 1. Traditional 2. In-lieu transfer	Unapprop. Balance (Everyone) (Treasury (T) Funds)	In-Lieu (Certified) (Begins in 2009)	Min. Program (Non-Certified)
Amounts	50%	30% + 50% From In-Lieu	1/7 of Bal. Per Year (T)	50% (T)	At Least $3 Million
How Can It Be Spent?	P1's & 2's P3's in conjunction with Non-Coal	P1's & 2's P3's in conjunction with Non-Coal	P1's & P2's P3's (coal only unless certified) No Non-Coal	As authorized by State Legislature regarding mineral development	P1's & Ps'2 P3's Non-Coal (But no Federal Make-up Money)
30% AMD Set Aside	Y	Y	N	N/A	Y (Limited to State Share and Historical Coal)



Attachment 2



Attachment 3

United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240

JUN 14 2007

John F. Husted, President
National Association of Abandoned Mine Land Programs
Ohio Division of Mineral Resources Management
Department of Natural Resources
2045 Morse Road, Building H-2
Columbus, Ohio 43229

Dear Mr. Husted:

Thank you for your letter of May 21, 2007, in which you submitted comments, suggestions and reactions to the draft rules to implement the 2006 Amendments to the Surface Mining Control and Reclamation Act (2006 Amendments). Office of Surface Mining Reclamation and Enforcement (OSM) provided these documents to the National Association of Abandoned Mine Land Programs and the Interstate Mining Compact Commission on April 20, 2007. We understand that your letter also provides your input on the "Major Policy Issues" document we forwarded as well. These comments will be helpful in the upcoming days as we work toward rules which we plan to publish before September 30, 2007.

These draft rules and the policy document were both distributed as part of our outreach efforts to the States and Tribes. Likewise, our meetings with your organization in Saint Louis in January and our meetings with you in Indianapolis in May were efforts to involve you in the process and to make the best decisions possible as we develop our rules. Based upon your comments, that process is working.

As we have discussed on several occasions, the draft regulations are not set in stone and we continue to evaluate the policy calls as we move the process through OSM. No final decisions have been made at this point and we will certainly take your comments into consideration. Also, we are working with the solicitor's office to ensure that we follow the law as we address the policy issues that must be decided.

We appreciate your interest and involvement in implementing the 2006 Amendments. Please feel free to contact me at 202-208-4006 if I can be of further assistance.

Sincerely,

Brent Wahlquist
Acting Director

The CHAIRMAN. Mr. Corra.

STATEMENT OF JOHN CORRA, DIRECTOR, WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, CHEYENNE, WYOMING

Mr. CORRA. Good morning, Mr. Chairman. I wish to thank you and the members of the Committee for inviting the State of Wyoming to testify today.

I am here to speak about the successful implementation of SMCRA, and to express a few concerns over the implementation of the recently passed amendment to that Act.

Wyoming is the nation's leading producer of coal, providing fuel for over 35 percent of the nation's coal-fired electric power, and by far the largest contributor to the Abandoned Mine Land Account. Clearly, the success of SMCRA and how well it functions in the future is of critical importance to my state.

Although my remarks are somewhat Wyoming-centric, they are shared by the other western states and the Reclamation Committee of the Western Interstate Energy Board. Over half the nation's coal production comes from our sister states in the West.

Over the years, 134,000 acres have been disturbed by coal mining in Wyoming. A true measure of the success of SMCRA is that almost half of those acres have already been reclaimed. An example of successful reclamation is the Dave Johnson Mine in Wyoming, where the land has been reclaimed to the point where the untrained eye cannot tell the difference between the native undisturbed land and the reclaimed land. I have posters behind me that demonstrate that.

The photographs illustrate some of these lands. Notice the abundance of shrubs, a feat that can be extremely challenging in the arid West, particularly in Wyoming, where many areas have annual rainfall of less than 15 inches.

Another example is the designation of part of the reclamation at the Jacobs Ranch Mine as crucial winter habitat for elk. And that declaration was made by the Wyoming Game and Fish Division.

Another success of SMCRA is the maturation of the relationship between the states and the Office of Surface Mining. Initially there was a high level of confrontation and a lack of trust. This relationship has changed for the better. There is a desire to assist the states and be responsive to the states' needs, as evidenced by several technical assistance programs now available. These programs help the states because of their ability to marshal resources far greater than what the individual states can afford.

These programs also contribute to the development of state staffs. This has allowed Wyoming to respond to ever-increasing coal production while reducing the number of staff due to shortfalls in the Federal grant. I have a couple of exhibits behind me, Mr. Chairman, that demonstrate those trends.

Another success story is the cooperative relationship with the industry that we regulate. Over the years we have come to understand the value of being responsive to each other's needs. To be effective and efficient, we have learned that open and honest communication is essential. We are truly partners in protecting the environment.

The biggest challenge facing the states is funding. State regulatory programs provide an incredible return on the investment of Federal dollars. In Tennessee, where the OSM has the responsibility to administer SMCRA, the cost to the Federal government is $1.13 a ton of coal mined. In contrast, neighboring Virginia has primacy, and the cost to the Federal government is a mere 11 cents a ton. The difference is remarkable.

The other important part of SMCRA that I want to discuss is Title IV, abandoned mine lands. Although much success has been experienced, this success is spotty. The Act requires that 50 percent of the abandoned mine land fees be returned to the states to

deal with the environmental consequences and legacy of past mining.

In Wyoming, the closure of 1,500 hazardous mine openings and the reclamation of over 32,000 acres of land are just a couple of examples of success. With respect to AML non-coal work, I want to point out that over the past 20 years, OSM has recognized the importance of providing support to western states to clean up the overwhelming number of abandoned non-coal sites.

Speaking for Wyoming, we have been very pleased with the balance of support from OSM. At this time, however, we cannot predict that the future will be as productive as the past, primarily due to current rulemaking that will implement the changes to SMCRA. Although OSM has been very kind in allowing the states to provide their viewpoints on rulemaking, I am compelled to express some very serious concerns.

Much of the state share of the fee collected was never returned. Using Wyoming as a case-in-point, over $500 million has been withheld over the years. The amendments, in part, are intended to rectify that, as well as other problems associated with the funds flow to the states.

From Wyoming's perspective, the OSM appears to be using old tools to implement the requirements of the new Act, primarily in the form of the existing grant process, to manage and distribute fee collections. The new language in the recent amendments requires that certified states, such as Wyoming, will receive their unappropriated balance in seven equal payments, beginning in Fiscal Year 2008. It further requires that the state's share of annual fee collections going forward be in the form of a payment from the U.S. Treasury in lieu of an actual distribution from the current fees collected.

The traditional administrative process, which consists of the states applying for, and the OSM approving and authorizing, projects and grants does not serve the intent of the Act, and would be seriously flawed.

I conclude by reinforcing the key variables to ensure that we build on our past successes and avoid the mistakes. First is to ensure that the professional relationships that have been built between the regulated community, the states, and the Federal government continue to be nurtured.

Second, the serious funding shortfalls must be addressed to ensure that we maintain efficiency and not lose effectiveness.

Last, we need to take great care in drafting the rules that will implement the amendments to SMCRA. This is an opportunity to truly leverage what we have learned over the years, and ensure that the pressing reclamation needs across the country are addressed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Corra follows:]

Statement of John Corra, Director,
Wyoming Department of Environmental Quality

Good morning Mr. Chairman. My name is John Corra. I am the Director of the Wyoming Department of Environmental Quality. I wish to thank you and the members of the U.S. House of Representatives Committee on Natural Resources for inviting the State of Wyoming to testify at this hearing today.

I am here to speak about the excellent history and successful implementation of The Surface Mining Control and Reclamation Act of 1977 (SMCRA) and to express a few concerns over the implementation of the recently passed Amendment to that Act. Wyoming is the nations leading producer of coal, and by far the largest contributor to the Abandoned Mine Land reclamation program. Clearly the success of SMCRA and how well it functions in the future is of critical importance to my State.

Although my remarks are somewhat Wyoming centric, they are shared by the other western states and the Reclamation Committee of the Western Interstate Energy Board which is associated with the Western Governor's Association.

With the passage of the Clean Air Act in 1970, Wyoming coal production started a steady increase. Today, Wyoming is the country's largest producer of coal with production approaching 450 million tons per year; more than double that of any other state. Wyoming coal is used to generate over thirty five percent of the county's coal generated electrical power. Over half the nation's coal production comes from the western states.

Coal mining is by far the most stringently regulated mineral extraction industry and yet has seen tremendous growth since the passage of SMCRA. The biggest success of SMCRA has been the ability to accommodate this growth while still achieving compliance with the regulatory requirements. For example, over 134,000 acres have been disturbed by coal mining in Wyoming (an area that is nearly three and a half times the size of the District of Columbia). A true measure of success is the reclamation, and almost half of those acres have been reclaimed. Several innovative approaches to creative reclamation have been developed and implemented in Wyoming and at other western coal mines, resulting in better and more cost effective reclamation. These include the use of variable topsoil replacement depths to achieve specific vegetation goals; the creation of bluff features to replace natural features removed by mining; and the replacement of alluvial valley floors. Coal operators in Wyoming and the western states have won numerous reclamation awards as a result.

An example of successful reclamation is the Dave Johnston Mine in Wyoming where the land has been reclaimed to the point where the untrained eye cannot tell the difference between the native-undisturbed land and the reclaimed land. The attached Photographs 1 thru 4 illustrate some of these reclaimed lands. Notice the abundance of shrubs, a feat that can be extremely challenging in the arid West, particularly in Wyoming where many areas have annual rainfall of less than 15 inches. These shrubs provide important habitat for sage grouse which was considered for listing under the Endangered Species Act. Another example is the designation of part of the reclamation at the Jacobs Ranch Mine in Wyoming as Elk Crucial Winter Range by the Wyoming Game and Fish Department (see attached Photograph 5).

Another success of SMCRA is the maturation of the relationship between the states and the Office of Surface Mining (OSM). Wyoming, as with many other states, had a coal regulatory program in place prior to the passage of SMCRA. Initially, there was a high level of confrontation between the state regulatory agencies and OSM. The states felt that OSM's attitude was "we're here to tell you how to do it right" and the states' attitude was "we know what we're doing as we were doing it long before you were created.—There was also a lack of trust as the states felt OSM was primarily interested in catching the states doing something wrong. This relationship diverted energy and resources from the true purpose of SMCRA—that of protecting citizens and the environment from the impacts of coal mining.

This relationship has changed for the better. Most within OSM truly have a desire to assist the states and be responsive to the states' needs. Programs that have exemplified this attitude include the Western Regional Office of Technology Transfer, OSM's National Technical Training Program and the Technical Innovation and Professional Services Program. These programs provide great assistance to the states because of their ability to marshal resources far greater than what individual states could afford. Wyoming has used this assistance to improve our technical capabilities in the area of Global Positioning Systems to track reclamation progress and problem areas in the field. The OSM's technical assistance and training programs have also contributed to staff development. This has allowed Wyoming to respond to ever increasing coal production while reducing the number of staff devoted to coal due to shortfalls in the federal grant.

The heart of any program and the key to its success or failure is the people who implement it. With the maturation of the coal regulatory program is a corresponding maturation of the staff, both in the states and in OSM. The states have been successful in attracting and retaining well-educated staff, many of whom have been with the program for more than 20 years. This experience is a key ingredient in the success of the regulatory program. Many of the environmental issues that we

face are long term issues and retaining and developing an experienced staff is therefore a high priority.

The science of reclamation is still young and progress takes time and people who are willing to devote their time and energy to the work. When SMCRA was passed 30 years ago, achieving successful revegetation in arid and semi-areas with less than 15 inches of average annual precipitation was considered to be nearly impossible. The mines have demonstrated revegetation is possible. Over the past 30 years, dedicated individuals with the state and the mines have developed new reclamation techniques and seed mixes to enhance reclamation. Not only to achieve success at the end of the ten year bond liability period, but beyond.

Another of the key elements in our maturing programs is the development of a cooperative relationship with the industry that we regulate. In the early years of our program there was a great deal of distrust, animosity and a generally adversarial relationship all around. Over the years we have come to understand the value of being responsive to each other's needs. In order for our programs to be effective and efficient we have learned that open and honest communication is essential. The industry needs to understand the regulators' concerns and vice versa. The industry and the agencies have learned that we are truly partners in protecting the environment. Partnership is founded on mutual trust and respect. An adversarial relationship is not generally effective for either side. This partnership has been crucial as our staffing levels have decreased.

The biggest challenge facing the states is funding and this is also the biggest failure of SMCRA. Section 705 authorizes the Secretary to make annual grants to states with approved State Programs for 50% of the cost of the program. This amount is increased for states with cooperative agreements for federal lands by an amount not to exceed the amount the Federal Government would have expended if the state had not entered into a cooperative agreement. This has not happened and Title V Grants to the states have not kept pace with inflation.

Attached Figure 1 shows the rise of western production along with the level of Title V grants to the western states. The grants have been adjusted to constant 1994 dollars to account for inflation. The chart shows that, adjusted for inflation, grants to western states have actually decreased. Western programs are typically small in size even though coal production is equal to or greater than eastern or mid continent states. For example, Wyoming has the largest staff with 24 employees, while other states have less than 20 people. And, there are some state staffs with fewer than ten people. A small shortfall in funding can have a huge impact on our programs.

States are faced with two choices. One is to use state funds to make up the shortage in the federal grant. While this has occurred, states at times are faced with budget constraints of their own. Even for states with robust economies, there is little desire by state legislatures to accept unfunded federal mandates. The other option is to reduce the size of their programs and operate at lower levels of service. Vacancies go unfilled and staff is transferred to other programs. The loss of one or two staff positions due to grant shortages can mean a five to ten percent reduction in the program effectiveness. This can be devastating to a small program. Montana, Utah and Wyoming have all experienced a reduction in coal program staffing levels due to grant shortfalls. This trend cannot continue without significant impacts to the quality of the programs, i.e., permitting and compliance responsibilities and mine site reclamation. In Wyoming, coal production is soon expected to reach 500 million tons per year. We will not be able to maintain our permitting, inspecting and enforcement capabilities at current levels if the downward trend in staffing continues (see Figure 2). Building on the success of SMCRA over the past 30 years will be very difficult, perhaps impossible, unless federal funding policies are changed.

The experience in Tennessee highlights the importance of OSM adequately funding state programs. Tennessee relinquished its state program and it is now a federal program state where OSM is the regulatory authority. In FY 2005, 2.98 million tons of coal was produced in Tennessee. OSM spent $3.37 million on this program for a regulatory cost of $1.13 per ton. For the same year, coal production in neighboring Virginia was 29.64 million tons. The total cost of Virginia's program was $6.8 million or $0.23 per ton. OSM's grant share of that cost is a mere 11 cents per ton! There is a huge difference between the cost of OSM implementing a coal program and the states doing so. By extrapolation, it is estimated the cost of running federal programs in the western states would be $56 million. By contrast the western states are only asking for $9 million in their grants for the federal cost share of their programs. SMCRA anticipated issuing grants to the states to pay for implementing the coal program as if OSM were to implement the program. The states are requesting an amount far less than that. The federal government is getting a fantastic return for the money spent on state grants, but the ability to sustain high quality programs

into the future is jeopardized. For the continued success of SMCRA, the shortfall in the federal grants to the states must be addressed.

The other important part of SMCRA that I want to discuss is Title IV—Abandoned Mine Lands. Although much success has been experienced, this success is spotty. The intent of SMCRA not only was to address the impacts from active mines but also pre-law mined areas that were never reclaimed. Many of these sites not only severely impact the environment but posed dangerous risks to human health and safety. To address these issues, SMCRA imposed a fee on coal production to fund the intent of Title IV. The Act requires that 50% of all abandoned mine land fees collected by the federal government be returned to the states for use in reclaiming abandoned mines, and to deal with the environmental consequences and legacy from mining conducted prior to enactment of SMCRA in 1977.

State level Abandoned Mine Land Programs have had great success as evidenced by the large amount of work completed. This has been possible through the excellent efforts of state personnel and the cooperation from OSM over the years. In Wyoming, since 1983, AML has closed 1,500 hazardous mine openings, reclaimed over 32,000 acres of disturbed land, abated or controlled 25 mine fires and thirty eight miles of hazardous highwalls have been reduced to safer slopes. Additionally, over $80 million has been spent to mitigate and prevent coal mine subsidence in residential and commercial areas of five Wyoming communities, and $84 million have been invested in infrastructure projects in communities impacted by past mining. We also maintain an active partnership with federal agencies to eliminate mine-related hazards on federal lands.

The AML program's failure is that much of the state share of the fee collected was never returned to the states, thus postponing the important work that was intended to be completed by Congress at the time of passage of SMCRA. Using Wyoming as a case in point, over $500 million has been withheld over the years. Meanwhile, impacts to the environment continue and lives continue to be lost in old mine workings.

With respect to AML non-coal work, I want to point out that over the past 20 years OSM has recognized the importance of providing support to western states to clean up the overwhelming number of abandoned non-coal sites. Speaking for Wyoming, we have been very pleased with the balance of support from OSM. At this time, however, we cannot predict that the future will be as productive as the past, primarily due to current rulemaking that will implement the changes to SMCRA from the recently passed Surface Mining Control and Reclamation Act Amendments (Amendments). Although OSM has been very kind in allowing the states to provide their viewpoints on the rulemaking, I am compelled to inform this Committee of some very serious concerns.

From Wyoming's perspective, the OSM appears to be using old tools to implement the requirements of the new Act, primarily in the form of the existing grant process, to manage and distribute fee collections. The Amendments specifically state otherwise. The new language in the recent amendments requires that certified states such as Wyoming will receive their un-appropriated balance in seven equal payments beginning in FY 2008. It further requires that the state's share of annual fee collections going forward be in the form of a payment from the U.S. Treasury in lieu of an actual distribution from current fees collected.

The traditional administrative process which consists of the state applying for and the OSM approving and authorizing projects and grants does not serve the intent of the Act and would be seriously flawed. The Act does not specify a grant process, and very clearly does say that payments will be made. Indeed, § 401(f)(3)(B) excludes certified states from receiving grants. The Act also specifies that these funds are to be used for purposes as established by the state legislature with priority given to addressing the impacts of mineral development. Our legislature has already moved to position itself to take on this task. A law creating an abandoned mine land funds reserve account was passed earlier this year. All funds received from the federal government from the Surface Mining Control and Reclamation Act Amendments of 2006 must flow into this account and remain there until appropriated by the legislature. The Wyoming Legislature has a long history of successfully fulfilling its fiduciary responsibilities and competently managing funds distributed from federal accounts. The capability exists to do the same with the fee payments that the Act calls for.

Western states are committed to completing the abandoned coal mine reclamation work, and fulfilling the original intent of SMCRA. But they are also faced with significant threats to the environment and to human health and safety from abandoned non-coal mines. Current rulemaking efforts by OSM must allow discretion to these states so that this serious problem can be addressed. Each state is unique, and the OSM should be flexible and provide a regulatory framework that meets the

needs of each state. We believe that the core Mission of OSM, and the original intent of SMCRA will not be compromised by doing so.

I conclude by reinforcing the key variables to ensuring that we build on our past success and avoid the mistakes. First is to ensure that the professional relationships that have been built between the regulated community, the states and the federal government continue to be nurtured. Second, the serious funding shortfalls must be addressed to ensure that we maintain efficiency and not lose effectiveness. Last, we need to take great care in drafting the rules that will implement the Amendments to SMCRA. This is an opportunity to truly leverage what we have learned over the years, and ensure that the pressing reclamation needs across the country are addressed.

Photo 1 - Reclamation at the Dave Johnston Mine

Photo 2 - Reclamation at the Dave Johnston Mine

Photo 3 - Sage Grouse on reclaimed land
Dave Johnston Mine

Photo 4 - Sage Grouse on reclaimed land
Dave Johnston Mine

Photo 5 - Elk Utilizing Reclaimed Land at the Jacobs Ranch Mine

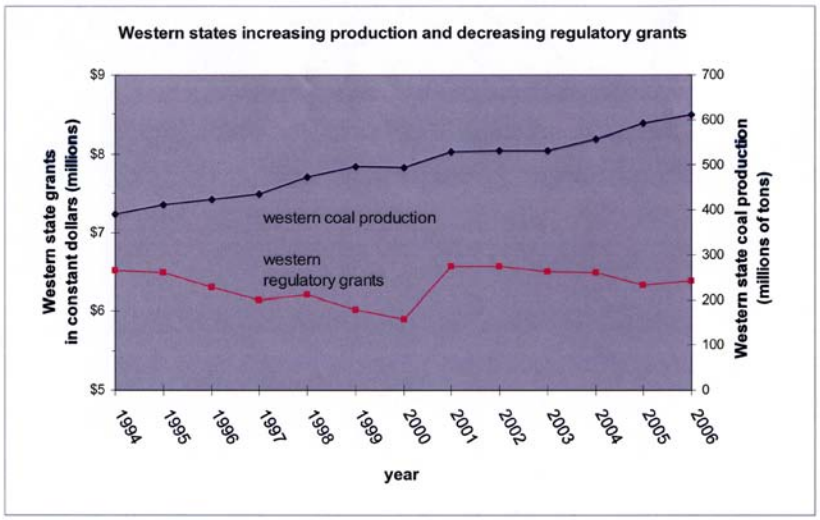


Figure 1
Western Coal production Increasing
Western Regulatory Grants Decreasing

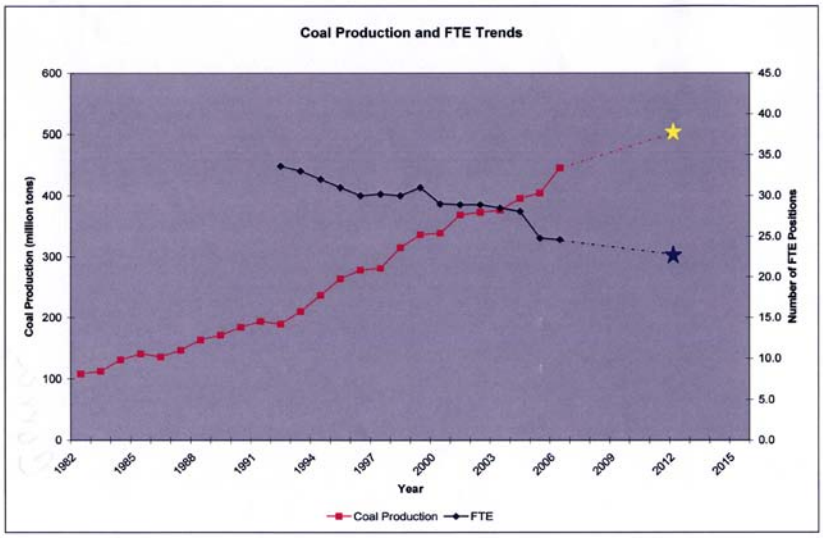


Figure 2 – Wyoming Coal Production and FTE Trends
Note: Projected coal production and FTE's are based on current trends.

The CHAIRMAN. Thank you. Thank you for your testimony this morning.

Let me begin by asking you, Secretary Timmermeyer—first, thank you for your kind comments. I appreciate it. And before I ask the panel the questions I have, let me ask the audience, is there anybody from the Office of Surface Mining that has remained with

us? Anybody here representing the Office of Surface Mining even taking notes to send to them?

Well, I guess they are closely glued to their tubes watching the internet, then. I hope they are.

Madame Secretary, you noted that about 75 percent of all surface mining applications in West Virginia set forest land as a post-mining land use. This shows that the state is stepping up to the plate in terms of creating natural carbon sinks to capture greenhouse gases.

But at the same time, continuing with the theme that I started in my opening remarks and in a question to OSM, to what extent are mountaintop removal operations in West Virginia being granted an AOC exemption in providing those post-mining land-use plans that the law requires—commercial, et cetera—as opposed to timberland?

Ms. TIMMERMEYER. Well, I know that we recently went through rulemaking in West Virginia to do what we could to spur companies to choose forestland as a post-mining land use. And there was a lot of deliberation and thought and discussion with scientific and technical folks that went into that.

And so I think that we are just beginning to see that choice of a post-mining land use to continue to be used more. And certainly, as you said, that is very significant when you talk about climate change issues, because a growing forest actually uptakes more carbon dioxide than even an old-growth forest. So that is something that is sort of a co-benefit of that.

And post-mining land use is one of the most important parts of SMCRA. And certainly it is our job as regulators to continue to assure that the land is being used for a higher and better purpose. And as I said, we have several examples in West Virginia of where that is being done.

The Governor right now is working on, as I mentioned in my comments, an Executive Order to continue to take that a step further and make sure that the industry understands that when that variance is obtained, that those post-mining land uses should be for development purposes, and that there should be things left behind for the communities to be used into the future.

The CHAIRMAN. Let me ask you a little further on that last point about this Executive Order. As I recall, the Underwood Administration and the Legislature created what is called the Coal Field Development Office, that was supposed to have done just to what you refer. More with the framework of these activities is already set forth in section 515[c] of the Act, established 30 years ago. And I am just wondering, could you elaborate just a little more on that framework? On what this new framework is going to be?

Ms. TIMMERMEYER. Well, there is a Coal Field Community Development Office that has been working with communities on master plans, but this really is going to take it a step further. And we are bringing in people who haven't typically been working on this issue. We are bringing in many of the state's economic development leaders and science leaders to work on the issue, to try to promote more economic development opportunities on post-mining land use sites.

The CHAIRMAN. Thank you. I was aware that this is going a little further than previous efforts, as far as being more inclusive of those that are involved in not only post-land use planning, but also economic development and the new technologies and the new businesses we are seeking as we seek to diversify our economy.

It does involve much more. We are involved with it at the Rahall Transportation Institute, for example, with Marshall, and working with these economic development planners in developing better post-mine uses of the land. So I appreciate that effort that you and the Governor are making.

Deputy Chief Husted, let me ask you. I note the three unresolved issues the states still have with OSM, with respect to implementing the changes in the law that Congress passed last year, this is a concern. But I think overall most of the states are pretty flush as a result of these amendments, which made the states' grants mandatory, no longer subject to the whims, the caprices, the annual appropriation process.

My question is, to what extent are the states prepared to now spend those funds for on-the-ground reclamation? Are contracts, for example, being expeditiously entered into?

Mr. HUSTED. Mr. Chairman, to answer your question across the board, for all the 30 states and tribes, I would have a difficult time saying what collectively was being done. I can give you an example of what is happening in Ohio.

For the last six months we have been working on a reorganization plan to be able to structure our organization to be able to handle the increased funds that will be made available to the state for the purposes of being able to do abandoned mine land reclamation. My assumption is that you will be seeing the same sort of efforts taking place in other states and tribes.

We won't be seeing the large increase come for about another two to three years. But if Ohio is any example, you have states and tribes out there looking at their programs and trying to organize themselves in such a way so that they can efficiently and effectively spend that new money.

The CHAIRMAN. Any others wish to comment on that question?

Mr. CONRAD. I might add, Mr. Chairman, that part of the case that we attempted to make to Congress over the course of the last several years regarding the need for reauthorization for increased funding was the fact that there are several of these projects on the shelf, ready to go. And I believe that the states are preparing now to move forward with many of those.

The bigger frustration continues to be with some of the minimum program states, who also have these larger projects that sometimes take multi-millions of dollars to actually effectuate the project. And hence, their concern about moving that funding forward.

The CHAIRMAN. OK. Madame Secretary?

Ms. TIMMERMEYER. Mr. Chairman, yes, I would say that it is an interesting and uncommon problem to have in environmental protection that we have more money than we can spend right now. Certainly what we want to do is have a plan for spending that money responsibly.

I think that the real test will be 15, 25 years from now, if people look back and say did this agency have a plan in place, and did

they use the monies appropriately and responsibly for not only reclaiming the land, but also for making sure we don't have a legacy of acid mine drainage problems in the state, and also to get water to those folks who had their water infrastructure affected by these pre-law sites.

So we are certainly working feverishly to be able to get a program together as well in West Virginia to spend the money appropriately.

The CHAIRMAN. Great. Glad to hear that. The gentleman from New Mexico, Mr. Pearce.

Mr. PEARCE. Thank you, Mr. Chairman. I appreciate the testimony that each one of you have given.

Director Corra, there is discussion right now here in Congress about climate change. And on the cutting edge of that discussion is the coal industry, because there are people saying we can't use coal to produce that.

If we experience a decrease in production based on something that we might do here in Congress, what happens to the AML program, the Abandoned Mine Land Program? If production drops, how drastically is the AML affected?

Mr. CORRA. Mr. Chairman, speaking for the State of Wyoming, the amount of money that we presume will be sent to us by OSM is sufficient to take care of our problems going forward. As coal production is impacted by any Federal legislation, it is our sense that the impacts will be gradual rather than abrupt, and fees will continue to be paid.

I might add that Wyoming is a certified state, and so what we receive actually is a payment in lieu of the fees that are collected from Wyoming, from the Treasury.

The CHAIRMAN. Thanks. Secretary Timmermeyer, I appreciate your observation, and I really appreciate the balance in the comment that we are to reduce the impact, and yet keep people in business. I think that that is an evolved point of view that is very productive, and I appreciate that.

You were mentioning the companies that were walking away since we implemented SMCRA. The companies that would walk away probably started before that, but of the start-ups after SMCRA, do you find the walk-away occurring at all, or very limited? How does that compare to before?

Ms. TIMMERMEYER. I think it certainly occurs less because of the program we have in place about companies, once they have walked away, cannot mine again, those types of issues.

But as with any business, it really trends. And we have seen throughout the years since SMCRA, there will be a lot of bankruptcies. And that just sort of goes with coal production, up and down.

I think the issue that you raised with the smaller companies going out of business, and now that we have larger companies doing business is an important point. Because now when companies do walk away, we have a lot larger sites and multiple sites on our hands to deal with in our special reclamation program, which deals with those post-law, post-SMCRA bankruptcy sites.

And so that has been an interesting twist on the way that we have to deal with that program. But fortunately we have a process

in place in West Virginia, as the Chairman is well aware, the recently authorized seven-up tax that was put on coal to help deal with the older special reclamation sites. And we are continuing to work into the future with dealing with ones that are current.

Now that really is evolving into thinking about what to do with those facilities which have perpetual AMD treatment issues. And so now we are talking about the next generation of how to deal with those sites, which may be water trusts and those types of things.

Mr. PEARCE. Now, your testimony, to me—in fact, the testimony of all four of the participants—came across pretty positive that we are moving our way to protecting our environment, and yet still providing a significant energy resource for the country.

Has your office, Secretary, done anything, any research about the coal-to-liquid discussion? In other words, that is another thing that is very highly politically charged. People saying it is absolutely not possible. And yet if it were possible, then coal could be really a tremendous help to us providing energy. Has your department done anything on studies about the safety of coal to liquids?

Ms. TIMMERMEYER. Yes, sir, really at the request of Governor Manchin, along with my fellow agencies in the state. We have been working on that issue. We have all had folks in our agencies actually do site visits for other states that are trying to introduce this technology.

And really, the first stage of that obviously is gasification before you liquefy. And so we are working diligently right now on a potential facility that will come into West Virginia to start that first stage of it, and then possibly move to that next stage.

So certainly it is a technology that many feel has been in place in other countries. And to the extent that that will help with our energy independence in West Virginia, our Governor is certainly very interested in that, and we continue to work on that issue.

Mr. PEARCE. And that conversion can be done with an environmentally safe impact?

Ms. TIMMERMEYER. That would be the key to making it happen. Yes, sir.

Mr. PEARCE. OK. Well, thank you, Mr. Chairman. I see my time is up.

The CHAIRMAN. The gentleman from Pennsylvania, Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman. And thank all of you for being here today.

First of all, a point of clarification. Are all six or seven of those binders one permit?

Ms. TIMMERMEYER. Yes, sir, this is one permit that was signed this week.

Mr. SHUSTER. All of them, OK.

Ms. TIMMERMEYER. And this is a separate 1977 one.

Mr. SHUSTER. OK. I just wanted to be sure of that. A question that I have is concerning the funding. And the debate over the last couple years in Congress has been certainly to try to get increased funding for abandoned mines, but the debate has raged. Does the money go to the West, where now most of the coal is produced, and that is where most of the fees are coming from? Or does the bulk of it stay in the East, where for the last half of the 1800s and the

first half of the 1900s, coal was, for the most part, coming out of West Virginia, Pennsylvania, which fueled the engine of America? So that is the debate.

So I wondered if each of you can comment. I can probably guess by where you are from, where you are going to come down. But I am especially interested, Mr. Corra, what your view is, and what your argument is as to why the West should get—and I know on the surface what you are going to say, but give me your argument. Why don't we start with you first?

Mr. CORRA. Well, Mr. Chairman, there was a bargain struck, if you will, when the Act was passed. And the Act clearly describes that funds are to be returned to the states, in a specific proportion. And that has never happened. And we just have that as a matter of principle, and that is our view.

I might add, though—I think it gets to your question, also—the recent amendments to the Act does provide for the actual fee collections which Wyoming coal miners will continue to pay on into the future, which will probably amount to about $125 million a year. Those actual fee collections are now going to be sent to other states where there are significant needs, such as Pennsylvania and West Virginia and some of the others. My personal feeling about that is that is reasonable.

In return, what we get is, for our fee share is we will get payments from the Treasury. And quite honestly, Mr. Chair, we are still not sure how that is going to happen, and if we will get those payments. But we do believe, and we appreciate the efforts of Congress in recognizing the western states, particularly Wyoming, in terms of returning those state shares.

Mr. SHUSTER. Secretary Timmermeyer, if you might respond to that.

Ms. TIMMERMEYER. Well, you are right in your statement that the eastern states, like Pennsylvania and like West Virginia and also Virginia, made sacrifices years ago. And really, to be able to fuel the nation's economy back during that time. And so it was very important to us that that be taken into consideration as the fund was reauthorized.

That said, I think that the result of the reauthorization was a compromise, and a very good compromise. And we are certainly excited about the prospects of the monies that we are going to receive over the next 15 years. And I think that that is our focus at this point.

Mr. CONRAD. One thing I might add, Congressman, is when we were first looking at potential accommodation of everyone's interests to find a piece of legislation that would work to address this issue, there was a meeting, an attempt of the meeting of the minds. And some of the states represented at this table came together early on to try to resolve those eastern and western differences and concerns. And the result of that, from my perspective, was a reauthorization bill that does do that, and will allow us to address the high-priority coal issues in the East, as well as the concerns in the West.

Mr. HUSTED. Yes, Mr. Chairman, Mr. Congressman, I believe that the amendments passed in 2006 to SMCRA do address the historic coal mining problems that have plagued many of the east-

ern states. With regards to the fairness between the East and the West, I believe that Director Corra addressed that as well as it could be. But I am very satisfied with the reauthorization of SMCRA that took place in 2006.

Mr. SHUSTER. And I wonder if you could comment—could I ask one more quick question—on productivity of reclaimed land. What have you found? I saw the pictures there, and you turn them into schools. But I am talking more about when you are turning them back into forests or other agricultural lands. How has the productivity been on reclaimed land, as compared to land that has not been mined?

Mr. CONRAD. With regard to trees, reforestation——

Mr. SHUSTER. Trees, anything. Growth, agriculture, anything that——

Mr. CONRAD. Yes, there are statistics that are gathered on that. Several of the universities, like Virginia Tech, Indiana University for the mid-continent, for prime farmland productivity, Southern Illinois University, they have been in the forefront of gathering those kinds of productivity numbers and doing those kinds of analyses in terms of particularly the restoration of the soil to allow those kind of productivity numbers to get where they are today.

And in almost every instance, they are in higher, better condition than would have been expected, and in some cases higher and better than before the land was mined. So we are seeing that we are able to accomplish that with some of the new technologies and techniques that are being used in the reclamation process.

Mr. SHUSTER. OK. Does anybody else care to comment?

Mr. CORRA. Mr. Chair, very quickly I would just say in Wyoming, we have seen very good productivity. And one of the things that was integral to that was some flexibility on the part of OSM in working with us, for example on topsoil replacement, which, in the arid parts of our state, was pretty significant enabling us to do that. But we have seen good productivity.

Mr. SHUSTER. And when good productivity, is that close to, as good, or better than before it was mined? That states a general question.

Mr. CORRA. Sure. Mr. Chairman, for the most part, better than it was before.

Mr. SHUSTER. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Shuster. All of you have commented on Congress's action in the end of last session, reauthorizing the AML program and how it was a compromise. You have saluted many people, and certainly it was a coalition that had to come together to produce this legislation. The United Mine Workers deeply involved, the coal industry deeply involved, the Bituminous Coal Operators Association. All of you were involved in it, and many across the Appalachian coal fields were involved in putting together this compromise. And finally we were able to secure the approval in the Congress.

I would also like to add and compliment a former member of this committee on what was then the majority side, Barbara Cubin, from your home state of Wyoming, who was instrumental on this effort, as well. We introduced the original Cubin-Rahall language,

a bipartisan legislation that started us down this road to where we are today, in a successful piece of legislation.

Ladies and gentlemen, thank you for being with us today. Did you have any further questions? OK. Thank you.

Mr. CONRAD. Thank you, Mr. Chairman.

The CHAIRMAN. Our next panelist is Mr. Cecil E. Roberts, President, United Mine Workers of America. It says on the agenda Fairfax, Virginia, but I know him to be Cabin Creek, West Virginia. And the Chair would like to compliment Cecil for his efforts not only on behalf of our working men and women in our coal mines in West Virginia and across the coal fields, but in so many legislative efforts. Whether it is reauthorization of the AML or whether it is the safety and health of our nation's coal miners, Cecil is a true leader. And we are honored to have you here this morning.

STATEMENT OF CECIL E. ROBERTS, PRESIDENT, UNITED MINE WORKERS OF AMERICA, FAIRFAX, VIRGINIA

Mr. ROBERTS. Let me thank you, Mr. Chairman, for the invitation to be here today. And I would also like to thank you for your years and years of service, particularly to the coal miners of this nation. You give me much too much credit with respect to the health and safety fights that we have been through.

I want to thank you for your efforts last year, when we faced a tremendous crisis, where 47 miners lost their lives in the nation's coal mines. You and other Members of the House and Senate took the leadership position that we needed stronger health and safety laws, and you led that fight. And I want to thank you for that.

I want to thank you for the passage of SMCRA back in 1977. You mentioned the Buffalo Creek disaster, which I think was probably the impetus for the passage of this law.

I just want to point out that many UMWA members lived on Buffalo Creek. Many UMWA members actually worked for the Pittston Company that constructed the impanelment that failed. It was a devastating time for all of us. And for you to be able to come to Congress as a freshman House Member and pass this law was truly a remarkable feat.

And I would just say to all of us, as we reflect on the benefits of SMCRA over the past 30 years, there is certainly a lot of criticism that could be offered, obviously, and it has been offered today. But I would just suggest to everyone that we would have had many more Buffalo Creeks had we not passed this law 30 years ago.

I come today as a representative of coal miners. The United Mine Workers have been in the coal mines for 117 years. Our original fights obviously were for better working conditions in the coal mines, fewer working hours underground, more health and safety, higher wages and benefits. Miners were originally paid by the ton, and that is the only way they got paid. If they didn't load any coal, they didn't get paid.

But we have been involved in the early fights over housing for coal miners, and the company houses and the company towns, fighting over fights dealing with the company store and being treated fairly by the company store and their employers. We have been in these communities; that is where our people live. With respect to the mountains and the hills of West Virginia and Kentucky

and all across this nation, coal miners do a couple different things. They hunt and they fish, and they mine coal, for sure. So it is important to our members that they have these opportunities available to them on a recreational basis, and also a safe and healthful place to work.

I think I should just say to this committee that Congress stepped forward to aid coal miners in 1946 and 1947 with the passage or the signing of a contract that was signed by the Federal government to provide healthcare to retirees. And one of the main reasons I wanted to be here today is to speak to that issue.

In 1946 the government seized the coal industry, and John L. Lewis and the United Mine Workers went on strike. And the government signed a contract with John L. Lewis saying that retirees would have lifetime health coverage.

We talk about abandoned mines. We had abandoned people back in 1992. And through your leadership, particularly in the House, Mr. Chairman, we were able to pass the Coal Act. And of course, with Senator Rockefeller and Senator Byrd in the Senate, we provided legislation that protected coal miners' healthcare.

That promise fell apart also as time went on, because some of the mechanisms that were put in the original law by Congress collapsed.

I have just come today to say thank you to you. And I also want to mention Representative Cubin from Wyoming; she was very helpful with respect to trying to see and deal with the problems of retirees from the industry.

Someone mentioned Horizon Natural Resources here earlier. I would just point out that those people who worked for Horizon Natural Resources, a huge company, when it went out of business they dumped like 5,000 or so pensioners. The UMWA paid their healthcare for eight months while this legislation was pending. Now they are covered by healthcare that is funded by the interest money that was set up in 1992 originally.

And then I want to commend you and this committee for the work that you did last year. It is so hard to bring all the parties together. And I think I should publicly thank everyone that was involved in this. All the states looked at these retirees and said they should be taken care of. Every state said that. The environmental community said that, and I thank them. And the coal industry said we realize that we can't pass legislation without dealing with these people who gave their lives to this industry.

I will just correct one thing that was said here earlier, when the question was posed about how many coal miners are there in the United States. And the answer was about 250,000. That is incorrect. There are less than 100,000 coal miners in the United States. I think that number varies somewhere between 65,000 to 75,000 nationwide.

But I would point out, and then I will take any questions that you have, that there are many people who make their living supporting the coal industry. And just to give you an example of that, there are 700,000 people that have a job in West Virginia. One hundred thousand of them are tied somehow to the coal industry, and there are only approximately 14,000 to 17,000 coal miners in West Virginia. So the remainder of those people are supporting the

coal industry. So there is a lot of jobs indirectly tied to this industry that provides good wages and good benefits, and I thought it would be helpful to correct that error from previous testimony.

I would be glad—I know I went over a bit, and I apologize for that. But I will take any questions that you might have.

[The prepared statement of Mr. Roberts follows:]

Statement of Cecil E. Roberts, President,
United Mine Workers of America

Chairman Rahall, members of the Committee, I am Cecil E. Roberts, President of the United Mine Workers of America (UMWA). The UMWA is a labor union that has represented the interests of coal miners and other workers and their families in the United States and Canada for over 117 years. We appreciate the opportunity to appear before the Committee to celebrate the thirtieth anniversary of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), an historic piece of legislation that continues to be of vital importance to mining communities across this nation.

When enacting the Surface Mining Control and Reclamation Act in 1977, Congress found that "surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner." That statement is as true today as it was in 1977. Coal mining contributes significantly to our national economy by providing the fuel for over half of our nation's electricity generation. Coal miners are proud to play their part in supplying our nation with domestically-produced, cost-effective, reliable energy. We also live in the communities most affected by coal mining and support the intent of Congress that coal mining must be conducted in an environmentally sound manner.

Throughout our 117 year history, the UMWA has been in the forefront of bringing social, economic and environmental justice to our members and the nation's coal fields. Our members toil in the nation's coal mines to provide domestically-produced energy that helps fuel our economy. The UMWA's goal is to protect the interests of our members on the job and when they return home to their families after a hard day's work. The UMWA has led the fight throughout our history to enact tough mine health and safety laws to protect miners on the job. Unfortunately, advancements in health and safety too often happen only after miners are killed on the job, as we all witnessed again last year. We have fought for compensation laws to assist those who are injured and occupational disease laws to provide for those whose health has been taken from them. The UMWA has also been in the forefront of providing health care and pensions to workers, establishing one of the first industry-wide multiemployer benefit plans. Through the historic 1946 Krug-Lewis Agreement—signed in the White House between Secretary of the Interior Julius Krug and UMWA President John L. Lewis—the UMWA, the coal industry and the federal government created the UMWA Health and Retirement Funds. Over the last 60 years the UMWA Funds has provided pensions and health care to hundreds of thousands of our nation's coal miners and helped to modernize the delivery of health care in coal field communities across the nation.

Indeed, years ago the Funds established ten regional offices throughout the coal fields with the direction to make arrangements with local doctors and hospitals for the provision of "the highest standard of medical service at the lowest possible cost." One of the first programs initiated by the Funds was a rehabilitation program for severely disabled miners. Under this program, more than 1,200 severely disabled miners were rehabilitated. The Funds identified disabled miners and sent them to the finest rehabilitation centers in the United States. At those centers, they received the best treatment that modern medicine and surgery had to offer, including artificial limbs and extensive physical therapy to teach them how to walk again. After a period of physical restoration, the miners received occupational therapy so they could provide for their families.

The Funds also made great strides in improving overall medical care in coal mining communities, especially in Appalachia where the greatest inadequacies existed. Recognizing the need for modern hospital and clinic facilities, the Funds constructed ten hospitals in Kentucky, Virginia and West Virginia. The hospitals, known as Miners Memorial Hospitals, provided intern and residency programs and training for professional and practical nurses. Thus, because of the Funds, young doctors were drawn to areas of the country that were sorely lacking in medical professionals. A 1978 Presidential Coal Commission found that medical care in the coal field communities had greatly improved, not only for miners but for the entire com-

munity, as a result of the UMWA Funds. "Conditions since the Boone Report have changed dramatically, largely because of the miners and their Union—but also because of the Federal Government, State, and coal companies." The Commission concluded that "both union and non-union miners have gained better health care from the systems developed for the UMWA." Federal funds have substantially improved the overall quality of medical care in these previously under-served communities.

Mr. Chairman, you know America's coal miners about as well as anyone I know. I think you would agree that they value the natural resources that God has given us. In their free time, you will find many of them fishing in the streams and hunting in the forests throughout the coalfields. Because of their love of the land, they are strong defenders of the need for responsible reclamation laws. Because they work in a vital energy industry, they also know that the nation needs the product of their labor. Perhaps more than most, they understand the need for responsible policies that balance our need for energy with our need to protect the environment. We believe the 1977 Surface Mining Act struck the right balance and the authors and supporters of that effort should be proud of their accomplishments. I know that Chairman Rahall was a member of the Committee at that time and a strong supporter of SMCRA during the Congressional debates of the 1970s and ever since. We are proud to say that the UMWA has been a steadfast supporter of SMCRA throughout its 30 year history.

While more than $5.7 billion has been appropriated for mine site reclamation since 1978, there are still many more sites requiring attention. With the reauthorization of the AML program as part of the Tax Relief and Health Care Act last December, Congress extended the AML Fund for 15 years. States and tribes will finally start to receive the resources they need to take care of the reclamation projects within their respective jurisdictions. The 2006 AML reauthorization also provided the long term financial solution for the health care of the thousands of abandoned retired coal miners and their dependents whose employers went out of business and ceased fulfilling their contractual promises to pay for their retirees' health care.

Coal miners especially appreciate the substantial financial support SMCRA has provided through the Abandoned Mine Land Fund (AML) to reclaim abandoned coal mines in the coal field communities. Through the AML Fund, mining communities across this country have received billions of dollars—monies collected through fees imposed on a per ton basis for all coal that is mined in the United States—to clean up abandoned coal mines. While the overwhelming majority of these funds has paid for the reclamation of abandoned mines, with the passage of the 1992 Coal Act, interest earned on the AML principal since 1995 has been used to help support the health care needs of abandoned retired coal miners. In other words, the Surface Mining Control and Reclamation Act has provided essential support for both the needs of abandoned coal mines and abandoned retired miners and their dependents. Once again, Chairman Rahall and other members of this Committee played a vital role in ensuring that the needs of abandoned coal miners were not forgotten.

When Congress authorized the use of AML interest to help finance the cost of health care for retired coal miners, it was a logical extension of the original intent of Congress when the AML Fund was established. Congress joined these two programs together for a specific reason—they both represent legacy costs of the coal industry that compelled a national response. When Congress created the AML Fund in 1977, it found that abandoned mine lands imposed "social and economic costs on residents in nearby and adjoining areas." When Congress enacted the Coal Act in 1992, it also was attempting to avoid unacceptable social and economic costs associated with the loss of health benefits for retired coal miners and widows. Moreover, as the U.S. Government Accountability Office (GAO) found in its 2002 report on the Coal Act entitled "Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue," CBF beneficiaries traded lower pensions over the years for the promise of their health benefits and engaged in considerable cost sharing by contributing $210 million of their pension assets to help finance the CBF.

Although some criticized the use of AML interest money to help cover the cost of coal miners' retiree health care, this marriage proved to be the catalyst for last year's reauthorization of the AML program which successfully addressed the varied—and sometimes conflicting—needs of the many interested parties. With all parties having a stake in the SMCRA debate—states and tribes, coal companies, environmental groups, and UMWA members—working together for the passage of the Tax Relief and Health Care Act last year, Congress was able to forge a political consensus that had eluded us for many years, allowing us to achieve goals that many of us have been pursuing since the passage of SMCRA in 1977 and the Coal Act in 1992. Not only did that legislation succeed in securing the long term financial support for retired coal miners' health care, but it modified the AML formulas to provide historic production states that have the most serious reclamation problems

with higher allocations, provided relief to operators by reducing the AML fees by 20%, and also mandated that minimum program states are guaranteed at least $3 million each year for reclamation efforts. In addition, the legislation took a portion of the AML fees collected off budget and, over a seven year period, all states and tribes will receive from the General Treasury an amount equivalent to their unappropriated balances in the AML fund. The end result of the legislation is that it resolved many longstanding and contentious disputes that had blocked AML reform for several years. More importantly, the legislation will mean more funds will be available to address vital reclamation needs in the coal fields.

In terms of abandoned retiree health care, the passage of the Tax Relief and Health Care Act has addressed the financial problems that have plagued the Coal Act since its passage in 1992. As many are aware, adverse court decisions and an unanticipated series of bankruptcies in the coal and steel industries had eroded the original financial mechanism Congress intended to fund Coal Act health care obligations. As a result, on three separate occasions Congress had to provide emergency appropriations, using unused AML interest money, to keep health care benefits from being cut. With passage of last year's AML reauthorization, these and many other issues have been resolved.

Mr. Chairman, the UMWA and its members are grateful that Congress forged a bi-partisan consensus to reauthorize the AML Program and provide a long-term solution to the coal industry retiree health care financial crisis. We have in previous appearances before the Committee provided the historic context for the government's unique promise of health care to coal miners. You know all too well that over their working lives, these retirees traded lower wages and pensions for the promise of retiree health care that began in the White House in 1946 when the Krug-Lewis agreement was signed. In 1992, miners willingly contributed $210 million of their pension money to ensure that the promise would be kept. Everything that this nation has asked of them—in war and in peace—they have done. They are part of what has come to be called the "Greatest Generation" and deservedly so. They have certainly kept their end of the bargain that was struck with President Truman. In 2006 we were delighted that Congress forged the political consensus that allowed the federal government to keep its promise once again.

Today, we appreciate having this opportunity to thank every Member of Congress for remembering the plight of our retired miners and widows. I come before you to convey a heartfelt thank you from all the retirees including the original 112,000 beneficiaries for the hard work of this Committee in keeping that promise.

I would be happy to answer any questions you may have.

The CHAIRMAN. Thank you, Cecil. You have referred to the original legislation in 1992, in which I was heavily involved, as well. It did allow for the first time the interest on the unappropriated balance in the AML to be used for coal miner healthcare. You refer to that and the ensuing amendments of last year, and all the individuals and groups involved. I certainly commend you for your leadership, as well.

Mr. ROBERTS. Thank you.

The CHAIRMAN. It would not have happened if the United Mine Workers had not been there and deeply involved on a daily basis, especially the individual sitting right behind you in the name of Bill Bannick. We appreciate the professional and respected team you have working for you here.

So I guess I would just ask one simple question. And you referred to the promise of healthcare that goes back to John L. Lewis days. Have we kept the promise? Has Congress kept the promise of cradle-to-death healthcare for our nation's coal miners?

Mr. ROBERTS. I can report to you, as of the end of December, every retiree that had the requisite years of service—20 years, age 55—and whose company was gone, went bankrupt, abandoned them, as you will; as of the end of December, every one of those retirees had their healthcare. And this Congress I think should feel good that they kept the promise that this government made.

Now, as time goes on, people will retire. There will be some dispute, debate about the eligibility requirements. But when we finalized this bill at the end of December, every single retiree who was pension-eligible or had that promise made to them was getting their healthcare. And I just feel that I should say thank you to this Congress for that.

The CHAIRMAN. Well, I am glad to hear that. And you mentioned it, and I mentioned it throughout these deliberations. As we seek to address the problems of abandoned mine lands, it is most important that we not forsake the abandoned coal miner, him or herself.

Mr. ROBERTS. That is true. And one of the things I would point out, more often than not when a mine site is abandoned, that company has probably gone into bankruptcy; probably left people without their wages, without their benefits, without their healthcare.

And so we have two types of problems here with respect to this. It is abandoned mines and the communities that are adversely affected by that. But we also have abandoned human beings who gave their lives to this industry.

The CHAIRMAN. Thank you. Let me ask you one final question. Thomas Jefferson once wrote, and I quote, "I much prefer the dreams of the future than the history of the past." And I applaud that sentiment. Yet the past of your union is so clearly grounded in places like Paint Creek, Cabin Creek, Blair Mountain, where the struggle for dignity, the struggle for workers' rights were fought with blood. That while we can prefer the dreams of the future, the past certainly cannot be ignored. Equally with the history of surface mining.

So as we look to the future, do you see a time in the hills and hollows of the Appalachian coalfields where we can have a dovetailing, as I referred to in my opening statement, of the interests of environment with that of surface mining?

Mr. ROBERTS. As has been properly pointed out here today, it is a difficult struggle. But I happen to believe, as we came together last year with so many competing interests, and sent together people from Wyoming and people from Pennsylvania and West Virginia, and all across this nation—quite frankly, Republicans and Democrats, conservatives and liberals—and came to grips with this extremely, extremely complex problem of how to re-fund and reauthorize AML, and we did it. It wasn't easy, but it took your leadership and others, and Representative Cubin's leadership also. I would like to think that people of good mind and good heart and common objectives can do that.

The CHAIRMAN. Thank you. Mr. Pearce?

Mr. PEARCE. Thank you, Mr. Chairman. I appreciate your testimony, Mr. Roberts.

As I listened to Secretary Timmermeyer's on the last panel, she talked about the companies that are more sophisticated, that was from her environmental point of view that they are more geared for today's regulatory environment in our culture.

What about from the worker's point of view? Are the companies more sophisticated? Give me a little bit of insight on that.

Mr. ROBERTS. Well, companies, I am sure the industry might have a different perspective on this, on any given day I am either

up here working with the industry or fighting with the industry. And that is just the nature of what I do.

But I think there are many sophisticated companies out there, and then there are some companies that are not too sophisticated, and quite frankly are living way, way in the past, just to be quite honest about it. But many of the companies that we deal with, we have disagreements, for instance, with Council and Peabody, but we find a way to work out our differences. And generally when they have a good labor relations program, they don't necessarily leave the environment in a mess, either.

But it is the companies that want to have bad labor relations, that takes you to bad environmental record. There are some companies—and you can look at the statistics and see who they are—that have horrendous environmental records in West Virginia.

Mr. PEARCE. Talking about environmental things, you heard my questions earlier about coal to liquids. Has the UMWA taken a position on coal to liquids?

Mr. ROBERTS. Absolutely. We have supported this. It seems ironic to me, if you read the history of World War II, the Nazi war effort was fought with fuel made from coal because the oil supplies were bombed by the Allies. But they found a way back in the 1940s to convert coal to liquid and jet plane fuel, and fueled artillery pieces, and transported them by fuel made from coal.

There is a picture, I am sure Congressman Rahall has seen it, of former Senator Jennings Randolph. It must have been taken I guess in the late fifties, mid-fifties. He was in a plane that he was flying that someone had made fuel from coal, and he was flying in that plane. It is a very famous picture back in West Virginia.

We are extremely supportive of this program.

Mr. PEARCE. OK. So I have an online petition that was submitted to us that basically says, I think, that liquid coal would be a disaster in our fight against the climate crisis; Congress should vote against tax breaks and substitutes for coal. So I suspect that I would clearly understand that you would ask that I not respond in a positive way to this particular online poll?

Mr. ROBERTS. Oh, I am not going to sign that petition, if that is what——

[Laughter.]

Mr. PEARCE. What about the, there is a move in Congress to have the coastal states be allowed to prevent coal mining in inland states. Has your UMWA taken a position on that?

Mr. ROBERTS. We have not. When you talk about the inland states, very little coal—and I might stand to be corrected when I give this a little bit of thought—is mined from inland states. But I guess——

Mr. PEARCE. New Mexico does have——

Mr. ROBERTS. Yes. And I think, I don't know if Louisiana has a coal mine now or not. But New Mexico does. We have UMWA members mining coal in New Mexico.

Mr. PEARCE. But the discussion is that we would allow those states on the coast to dictate, to actually shut down mining in the——

Mr. ROBERTS. Oh, you are saying that coastal states could dictate to anyone.

Mr. PEARCE. Yes, yes.

Mr. ROBERTS. No, we would not be supportive of that.

Mr. PEARCE. That actually is a provision.

Mr. ROBERTS. I misunderstood your point.

Mr. PEARCE. I appreciate that. It was actually a provision. It was in H.R. 2337 that we passed out of here, that would allow that to occur. It is a provision that concerned me quite a lot, and we actually spoke about that and tried an amendment, unsuccessfully.

But the stakes are very high right now for the coal industry. The climate-change argument has coal exactly in its bomb sites, and there are people who would shut down the entire production of electricity from coal, who we have had testimony in this room that would say stop coal, use wind and solar. And you produce 52 percent of the nation's energy; wind and solar, 1 percent producers. I personally don't see how we could get from 1 percent wind to let 50 percent of our power be produced by wind.

Have you got any comments about that focus that is on you all as an industry?

Mr. ROBERTS. Well, our analysis of removing coal from the energy mix would be impossible. If you passed a law today and said you couldn't burn coal, why, I think you would be revisiting that issue pretty rapidly, because many people would lose their lights, their heat, their air conditioning.

Let me make another comment about that, if I might. We approach this from another direction. There are 36 or 37 million people in this country living in poverty, as we speak. Coal provides the cheapest form of electricity in the United States, and we have benefitted from that for many, many years. And there isn't enough natural gas, by the way, to substitute for coal. And if there was enough natural gas to substitute for coal, people's electric bills would either double or triple, more likely triple. Although the BTU cost right now is about twice as much as the BTU cost from coal.

When you start talking about taking coal out of the competition, then natural gas prices are going to go through the roof. So people probably could not afford to pay their electric bills if that happened.

With respect to wind, there is no way to generate enough electricity from wind to substitute what coal does.

I think the answer here, and we have been an advocate of this for many, many years, and we have been here to Congress to advocate that we invest in technology to find a way to remove carbon from the burning of coal. The issue about coal to liquids is that particular issue: you do generate more carbon when you do this than with just gasoline that we use today.

But it seems to me that we invest an awful lot of money, Congressman, to figure out how to fight wars, and all the technology that goes into smart bombs and all this. I would like to see us invest some of that money in smart energy and how to burn coal more cleanly, so we maybe wouldn't need all those weapons that we invest in, and our economy could thrive, and people in West Virginia could have jobs, and people all across this country could have jobs. That seems like a pretty good idea to me.

Mr. PEARCE. Well stated. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. The Chair would just like to respond to the statement the gentleman from New Mexico just made in regard to this committee's energy bill, something to the effect that we allow coastal states to prohibit coal development through our energy bill. And I am just totally flabbergasted. I am not sure what provision to which the gentleman refers.

I do recall that we set up, or we voted a couple times, and our language does allow the coastal states, through their coastal management plans, to come together and coordinate and make sure and decide that what they do as far as offshore OCS drilling is not in violation of any Federal laws or state plans that they have. I don't interpret that as, in any way, saying that these states could, coastal states, could join together to prohibit the development of coal on inland states.

Mr. PEARCE. And with the Chairman's permission, we would like to get the testimony that occurred in that hearing, if you don't mind, and see if we can connect those dots, and see if my memory is correct or not.

The CHAIRMAN. Testimony. But I am looking for the language in the bill.

Mr. PEARCE. The testimony that the language in the bill actually does that, and there appear to be deep consensus. But let me see if our staff can find that. I do appreciate that question, thanks.

The CHAIRMAN. The gentleman from Pennsylvania, Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman. And Mr. Roberts, great to have you here with us today.

Mr. ROBERTS. Thank you.

Mr. SHUSTER. I hail from western Pennsylvania, which is, I have a lot of coal in my district. And as I mentioned earlier in questioning, coal is coming back strong. One of the problems I hear from coal companies is we don't have enough, we can't train enough people to get into the mines. So that is a good problem to have, to employ more people.

And it is good to hear that you report that at the end of December, that 100 percent of the retirees had healthcare.

Mr. ROBERTS. A lot of them in your state, by the way.

Mr. SHUSTER. Yes, sir, I do know that. And certainly one of my goals here in Congress is to seek coal production, coal employment rise in western Pennsylvania and across this country, because I think it is a large part of the answer to our energy situation. And mining it, and figuring out ways to liquefy it naturally, I believe about $100 million was appropriated to a coal liquefication plant in eastern Pennsylvania. I certainly wanted it in western Pennsylvania, but you don't always win those fights. But I am very pleased that the money is there to try to move forward on that.

My question to you is that it seems to me that, and as the Ranking Member mentioned, the coal industry is under attack by groups in this country. And I think, as I said, it is good for workers, it is good for communities. And many communities in my district felt the effects of the decline in coal. And now we are struggling to reopen mines, and it is very difficult, very costly to get them open. In fact, one company made a big announcement they were going to try to open a mine, and it was going to take five or six years. And they have decided to abandon that idea.

So I just wanted your thoughts on how do we move forward? What do you see are the hurdles, the stumbling blocks to mining, to creating these jobs? Because in the end, the best thing I think we can do for coal miners is create more jobs for them. So what are the hurdles? What are the things that you see out there in the regulatory arena that we need to change or streamline?

Mr. ROBERTS. Let me just harken back to testimony I gave I guess three or four years ago on another committee, and I was asked that very question.

I think the biggest challenge for coal miners, and you talk about well, you can't find enough coal miners, there are a lot of people who are not certain that they would like to work in this industry. Not because the industry doesn't pay well, and not because there isn't an excellent benefit plan available, particularly at union mines, but because of the uncertainty.

I would suggest to you, Congressman—I could perhaps go for another 30 minutes talking about this—the uncertainty about this industry. And it has probably been this way for 40 or 50 years, but it is probably more so right now.

Two years ago or thereabouts, there was a lot of investment in the industry. If you have read the financial pages recently, there are many analysts suggesting that coal is not a good investment, or at least is not as good an investment as they have been recommending, because of the uncertainty of what is going to happen.

That is true I think in any type of mining, in any state of the Union right now, and on a national basis. I think a number of coal companies, a number of investors, and for that matter young people trying to decide if this is an industry that they want to spend their future in, whether or not this industry is going to exist. And if it is going to exist, at what level, and what are the rules they must play by going into the future. That is a summary pretty much.

One word is uncertainty, both to coal miners and the industry itself, as to what the future might hold.

Mr. SHUSTER. And what is the key component of that uncertainty, in your view?

Mr. ROBERTS. Well, I think if you read, it is not secret that for a number of years now there has been a huge debate, not just in this country but around the world, about global warming, and rightfully so.

We opposed the Kyoto Treaty not because we didn't think that greenhouse gases existed, and not because we had some belief that earth wasn't warming. The Kyoto Treaty did not require what was known then, and I assume they still call themselves this, the G-67 plus one. The plus one was China, and the 77 were the developing nations of the world, to be bound by this treaty.

Part of the problem we fight with over every day in the labor movement is the trade deficit. And that trade deficit is climbing rapidly, as we speak here, to billions of dollars, as we speak. And it gets higher and higher and higher every year.

The question is, if China doesn't have to comply with what we do here, and Mexico doesn't have to comply, and India doesn't have to comply, how are we going to control the emissions in the atmosphere? It doesn't mean we shouldn't do anything. It does mean we

should compel others to do something correspondingly with what we do.

We went on record, and some of my friends in the coal industry would tell you that I shouldn't have, supporting the Bingaman approach. But the Bingaman approach requires the developing countries of the world to participate in anything that we are doing here to control emissions into the atmosphere.

So that is part, probably the biggest question mark as we move forward. What is going to happen with respect to what Congress may do with respect to that.

Mr. SHUSTER. Well, I see my time has expired, but I agree with your 100 percent. And not only were they not going to comply, but it was really a drop in the bucket.

And again, I agree. Is there global warming? Yes, probably. But 96 percent, 97 percent of it is not caused by plants that are burning coal, or even the cars that are burning gasoline. So if we are going to move forward, you are absolutely right; everybody ought to have to get on the same playing field. Fair trade is what we try to achieve in the world. Free trade doesn't exist anywhere, but on Main Street USA, when you can decide which store you are going to buy, or which car dealership you are going to buy a car from.

So I appreciate your testimony today. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. The gentleman from Washington, Mr. Inslee.

Mr. INSLEE. Thank you. Mr. Roberts, thanks for being here. I am a person who has been active. Excuse me, I turned that off. Excuse me.

Mr. ROBERTS. I heard you, but it was a little hard.

Mr. INSLEE. Thank you. And coal is obviously an enormous potential for us to get hundreds of years of supply, but obviously it puts out prodigious amounts of CO_2. And I have been one who has supported the concept of doing vigorous research in trying to figure a way to burn coal cleanly.

I have recently reviewed the MIT study that suggests that there is at least a good chance of being able to find some economic way to sequester CO_2. And I support a Federal investment on that in an accelerated way, to do as much as we can to figure out what that capacity is.

Now, that is not a unanimous opinion, because some folks, because of coal's history, have just failed to be able to envision a way to burn it cleanly. And my view is we need to try to find a way to do that.

But there are issues about the environmental issues regarding to mining, particularly the amount and type of mining issues that we have. And I thought that if we were going to build support, broad-based support for clean coal technology, it would be helpful to be able to give people confidence that the mining process will not extract unacceptable environmental consequences. All energy sources have environmental consequences. There is no totally benign energy source. Solar-cell energy creates mining issues for the rare minerals we use. Wave-power technology interferes with some fishing issues. Wind power has a visual impact. Everything has some environmental consequence.

But I think it would be helpful to build confidence in a potential clean-coal future if we can find a way to tell Americans we are trying to move forward to reduce the environmental consequences of mining, particularly this mountaintop mining that is contentious.

Do you have any thoughts in that regard, how we could try to build that confidence to help us in those efforts?

Mr. ROBERTS. I would consider that along the same lines as the Chairman's question about whether or not people of good heart and mind and objectives could sit down and find a way to come to grips with some of these difficult problems.

I think, from my perspective, one of the things that I have seen, particularly on this mountaintop mining situation, I know there are some folks who are adamantly opposed to it and want to abolish it. I respect that. There are others on the other side who might be making their living doing that.

I find myself, quite frankly, in a unique position. In one week about a month ago, two coal company executives wrote letters to the editor criticizing me, and one environmentalist, for being too close to the coal companies. So in a week I ran the entire gauntlet. So that tells me I must be somewhere in the middle here.

But coal miners, just to make a point, they don't get to decide what type mining the company does. The company decides that.

One of the issues has been let us stop mountaintop mining, and let us do deep mining. Well, if you can convert those jobs that the people have right into that, that would be a good point. The problem we have is we live in a competitive economic environment. If a coal company shuts down any mine, whether it is a deep mine or a mountaintop mine or a contour mine, whatever it might be, long-wall mining, miner sections, they close it down. What happens is it is like a jump ball in basketball. Those jobs don't belong to West Virginia. They don't belong to Kentucky. They don't belong to Wyoming. That marketplace doesn't belong to West Virginia. That marketplace doesn't belong to Wyoming.

The utility, once someone who is supplying to coal to them, now say OK, who wants to fill this order. And the truth is, if you go back and look from the passage, you talk about unintended consequences, I would suggest to you the 1990 Clean Air Act had some unintended consequences here. We lobbied here to require technology to be placed—and it was available on every utility in the United States. And we lost that fight.

But what happened is coal mines in northern West Virginia closed. Coal mines in western Kentucky closed. All the mining industry in Illinois shut down. The mining in Indiana shut down. Did mining stop? No. The mining shifted from traditional deep mines in those areas to the Powder River Basin. And it is good for Wyoming, but it is not very labor-intensive in Wyoming, because it is low-sulfur coal. So we displaced all those coal miners who used to belong to our union. We didn't get as good a result with respect to reducing sulphur nitrite, which we were attempting to do with the passage of the Clean Air Act. And we lost all these jobs. And then we had the problem that Congressman Rahall and I have been trying to deal with since the late eighties and early nineties, is what do we do with all these people who lost their jobs and lost their healthcare in the Appalachian communities.

So one of the things we have to be very careful with, the mentality, if we close some type of mining down, we are just going to shift that from Boone County over to Logan County, and we will all still have these jobs. It won't happen. Those markets will be made available. And what has happened here, there is more coal being mined, as we speak, west of the Mississippi River than east of the Mississippi River. And for the first couple hundred years of our history, that wasn't the case. But that is a direct, unintended consequence of shifting markets and shifting jobs from West Virginia, Ohio, Pennsylvania, Indiana, Illinois, and western Kentucky to west of the Mississippi River with the passage of the Clean Air Act.

And if you can show me, or if somebody can have a conversation with me on how we are going to keep these people working. One of the things that happens to me, put yourself in my position, I have been around a long time. I started mining coal in 1971. I hate to be this long, but I have to make this point. I apologize.

I started mining coal in 1971. People don't call me President that is in our union; they call me Cecil. Because we have known each other for 30 years. And I get a call from somebody I have known for 30 years, been in our union 30 years, and say hey, they are closing our mine down. Which side am I supposed to be on in that fight? I have to be on the side of the union members that I have known for 30 years.

I don't want to fight with somebody else. I mean, a lot of the people are on the other side of this issue, and I have great respect for them. But when you start saying well, we are going to put your members out of a job, there is only one place for the union president to be. If you get a union president who is not there, he is probably a person who shouldn't be representing workers.

So to answer your question in short, I think it is a difficult proposition. That is utopia, and that is what we would like to do, but it is hard, because we have all been through this for the last 30 years. This is not a new issue for us, trying to figure out how to keep jobs and dealing with the environment.

We predicted this, by the way, when we were up here—we were much younger then—when we were up here in 1990, saying we think there is going to be a tremendous job shift here. We think these jobs going west of the Mississippi River, and all these communities are going to be devastated. And guess what, they were. We have tried to recover from that, but it has made it more difficult.

Mr. INSLEE. Thank you.

The CHAIRMAN. Mr. Pearce?

Mr. PEARCE. Mr. Chairman, in response to your question, and I appreciate that, section 472 is where I drew the comments from that amends the Coastal Zone Management Act of 1972 by allowing for climate change. And specifically, as we go through the wording, in paragraph one it provides the assistance on down to a state that, to minimize the contributions to climate change and to prepare for and reduce the negative consequences that may result from climate change in the coastal zone, in our attempt to amend the Act and take this provision or somehow limit it, that was our point. That this section is going to allow the coastal states to go to the non-

coastal states in saying that you are affecting us, you are affecting our management zone by your output of carbons. And we will then effect those negative consequences—line 21.

I still feel like that with your question, that this does have a serious impact and a serious implication. I understand what your questions are, but the bill nowhere mentions, in this section, simply limiting to offshore production. It is a very broad application. And that is then the reason that we then submitted the amendment, to tighten it up or avoid the adverse impacts. Because I think that we all want to protect the environment, but we do need to be aware of what is taking place here.

The entire State of Florida is defined as a coastal zone, and so that gives us some understanding of the broadness of this. And I would yield to questions from the Chairman, but appreciate his observations.

The CHAIRMAN. The Chair will respond to the language that the gentleman just read from our energy bill that came out of our committee.

We in no way are granting the coastal zone states any regulatory authority. It does say in the coastal zone, those decisions are to be made. It is bootstrapping to arrive at the conclusion that any regulatory authority is in that provision.

So the Chair would respond in that manner to the gentleman's concerns.

Cecil, thank you.

Mr. ROBERTS. Well, thank you. I am sorry I got so——

The CHAIRMAN. This particular point did not involve you.

Mr. ROBERTS. I am sorry I got—two things I didn't understand. The Ranking Member's original question, I apologize for that. And I apologize for being so—I have been accused of this—long-winded with the answer.

But I want to make sure before I leave here that you and this committee and all Members of Congress, on behalf of the original 112,000 retirees whose healthcare was at risk, that we appreciate so much what you have done for us. Thank you.

The CHAIRMAN. Thank you for being with us. We do have a series of votes on the House Floor at this time, probably 30 minutes at least worth of votes. So with the concurrence of the minority, it would be the Chair's idea, and the patience and forbearance of the panels yet to be heard from, and I appreciate that, that we recess and come back at 1:30. I am sorry, 12:30. What is that, 11:30?

Mr. PEARCE. It is 12:30.

The CHAIRMAN. It is 12:30 now. We will come back at 1:30. The Committee stands in recess.

[Recess.]

The CHAIRMAN. The Committee will resume its hearing, and call to the witness table panel number four, composed of Walton D. Morris, Jr., of Charlottesville, Virginia; Joe Lovett, the Executive Director, Appalachian Center for the Economy and the Environment, Lewisburg, West Virginia; Brian Wright, Coal Policy Director, Hoosier Environmental Council, Indianapolis, Indiana; and Ellen Pfister, Shepherd, Montana, on behalf of the Northern Plains Resource Council and the Western Organization of Resource Councils.

Lady and gentlemen, we have your prepared testimony. It will be made part of the record as if actually read. And you may proceed as you desire. Mr. Morris, you want to start first?

STATEMENT OF WALTON D. MORRIS, JR., CHARLOTTESVILLE, VIRGINIA

Mr. MORRIS. Good afternoon, Mr. Chairman. Thank you for the opportunity to speak here today.

I am Walton Morris, an attorney based in Charlottesville, Virginia. For the past 17 years I have practiced law on behalf of environmental organizations and the residents of America's coalfields in matters arising under the Surface Mining Act.

Earlier in my career, I served for nine years in the Solicitor's Office of the Department of the Interior. During that time I litigated, or supervised other lawyers who litigated, most of the important early cases involving the Surface Mining Act.

Today I wish to address the history, current status, and future of the Surface Mining Act's public participation provisions.

The Committee's report on the bill that became the Surface Mining Act correctly concluded that the success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. With that conviction in mind, Congress established a broad range of public participation procedures meant to empower coalfield citizens, to supplement governmental regulatory efforts, and ensure effective oversight of state programs.

Soon after Congress enacted the Surface Mining Act, coalfield citizens actually began to use these provisions; to play precisely the role that Congress expected. Citizen efforts led to important successes in rulemaking, the maintenance of state programs, on-the-ground enforcement actions, and designation of lands as unsuitable for coal mining. These successes demonstrated the wisdom and practicality of Congress's plan for vigorous public participation.

However, even as citizens successfully invoked the Surface Mining Act's public participation provisions, obstacles began to appear. Rather than valuing the help that citizens provide, OSM grew hostile to public prodding, and has remained so, even to the point of stonewalling or unreasonably delaying response to the public's requests for basic information. As a result, the inspection and enforcement requests on both the state and Federal level are now turned aside for entirely unjustified reasons, or ignored altogether.

To compound matters, a host of misguided administrative and judicial decisions have curtailed the public's ability to compel inspection or enforcement action, or to correct state program deficiencies through actions in Federal Court. As a result, public participation under the Surface Mining Act has become so hobbled that, as a practical matter, citizens can no longer play the important supporting role that Congress envisioned.

For example, today OSM continues to withhold copies of permit application materials from New Mexico citizens despite a January 11, 2007, administrative decision directing OSM to make the requested documents available no later than 20 days from the date of that decision.

Today OSM, as the regulatory authority in Tennessee, routinely delays citizen requests to review permit applications and inspection documents. And the agency refuses to allow citizens to speak to mine inspectors regarding conditions that the mine inspectors have seen on the ground.

Today the state regulatory authority in Virginia continues to refuse to investigate citizen allegations that a coal operator is mining without a permit on the incredible theory that the state has no obligation to inspect, because it hasn't issued a permit yet for the mining operation in question.

Today Virginia's field office continues to ignore a citizen request for inspection and enforcement in the very same manner, even though the time for responding, under OSM's own regulations, has long since passed.

Today coalfield citizens in West Virginia face the crippling expense and uncertainty of a second round of administrative hearings in two appeals before a so-called multiple interest board, solely because the testimony of state and industry witnesses in the first round of hearings does not support legal arguments that the state regulatory authority subsequently dreamed up in a desperate attempt to prevail in the case.

Today citizens throughout America's coalfields are compelled to address environmental problems caused by surface coal mining operations under such statutes as the Clean Water Act, or the Resource Conservation and Recovery Act, because courts have foreclosed the use of the Surface Mining Act's citizen suit provision against state regulators who fail to perform mandatory duties that the Surface Mining Act imposes on those officials.

To restore public participation as an effective supplement to governmental regulatory efforts, and as a means for securing effective oversight of state programs, I urge this committee, and the Congress as a whole, to investigate and then counteract agency stonewalling of citizen requests for information, unwarranted deference to state regulators by Federal officials who are charged with oversight of state programs, the injustice of administrative review before state multiple-interest boards, and recent judicial misinterpretations of the statute.

I have addressed these problems more specifically in my written statement, and so I will now yield to my colleagues on this panel.

Thank you again, Mr. Chairman, for the opportunity to speak.

[The prepared statement of Mr. Morris follows:]

Statement of Walton D. Morris, Jr., Attorney-at-Law

I am Walton Morris, an attorney based in Charlottesville, Virginia. For the past seventeen years, I have practiced law on behalf of environmental organizations and residents of America's coalfields in cases arising under the Surface Mining Control and Reclamation Act of 1977 ("the Surface Mining Act"). Earlier in my career, I served for nine years in the Solicitor's Office of the Department of the Interior. During that time I litigated, or supervised other lawyers who litigated, most of the important early cases involving the Surface Mining Act.

Introduction

This Committee's report on the bill that became the Surface Mining Act concluded that:

> The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State or Department of Interior can employ only so

> may inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing....Thus in imposing several provisions which contemplate active citizen involvement, the committee is carrying out its conviction that the participation of private citizens is a vital factor in the regulatory program as established by the act.

With that conviction in mind, and mindful also that "increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal [state] enforcement are not repeated," Congress established a broad range of public participation procedures meant to empower coalfield citizens to supplement governmental regulatory efforts and ensure effective oversight of approved state programs. These procedures implement the public's statutory rights:

(1) to comment on proposed regulations and obtain judicial review of final rulemaking;
(2) to comment on proposed state program provisions and to obtain judicial review of decisions to approve them;
(3) to review and obtain copies of permit applications, inspection materials, and other information obtained or developed by the regulatory authority;
(4) to comment on permit applications and obtain administrative and judicial review of permitting decisions;
(5) to notify federal officials of violations of the Surface Mining Act or its implementing regulations, to participate in inspections conducted as a result of such notices, and to obtain review of adverse inspection or enforcement decisions; and
(6) to bring civil actions to compel coal operators to obey the law or to compel regulatory officials to perform any of the mandatory, non-discretionary duties the statute imposes on them.

Soon after Congress enacted the Surface Mining Act, coalfield citizens began to use the statute's public participation provisions to play precisely the role that Congress expected. Citizen comments on OSM's initial and permanent program regulations helped shape those rules into effective tools which ended many of the abuses that bedeviled America's coalfields. In litigation challenging rules that OSM improperly adopted, coalfield citizens further ensured that federal surface mining regulations accurately reflected Congress's intent.

In other litigation coalfield citizens reached settlements with OSM which led to correction of the coal industry's gross abuse of the so-called "two acre" exemption and to creation of OSM's Applicant/Violator System Office, which began the process of holding major coal producers accountable for environmental violations committed by business entities that those producers owned or controlled—generally, their "contract miners." Additionally, citizens prosecuted civil actions that ultimately caused State officials to strengthen state regulatory programs that had fallen far short of "minimum floor" that Congress meant the Surface Mining Act to establish.

In the administrative sphere, citizens filed inspection and enforcement requests and appeals to the Interior Board of Surface Mining Appeals (later the Board of Land Appeals) that ultimately led OSM and state regulators to compel major coal producers to reclaim mines that their contract miners had abandoned and to pay delinquent abandoned mine land fees associated with those mines. These and many other citizen successes proved the wisdom and practicality of Congress's plan to supplement governmental enforcement of the Surface Mining Act with the efforts of empowered coalfield citizens.

The Current Impairment of Public Participation Under the Surface Mining Act

Even as citizens used the Surface Mining Act's public participation provisions to achieve numerous successes, obstacles to effective public participation began to appear. Rather than valuing the help citizens provide, OSM became hostile to public prodding and has remained so—even to the point of stonewalling or unreasonably delaying response to the public's requests for basic information in instances where OSM is the regulatory authority. Inspection and enforcement requests on both the state and federal level are turned aside for entirely unjustified reasons or ignored altogether. To compound matters, a host of misguided administrative and judicial decisions have curtailed the public's ability to compel inspection or enforcement action or to correct state program deficiencies through actions in federal court. As a result, public participation under the Surface Mining Act has become so hobbled that, as a practical matter, citizens can no longer play the important supporting role that Congress envisioned. For example:

- Today, OSM continues to withhold copies of permit application materials from New Mexico citizens despite a January 11, 2007, administrative decision direct-

ing OSM to make the requested documents available no later than twenty working days from that date;

- Today, OSM, as the regulatory authority in Tennessee, routinely delays citizen requests to review permit applications and inspection documents, and the agency refuses to allow citizens to speak to mine inspectors regarding the conditions they have observed on the ground;
- Today, the state regulatory authority in Virginia continues to refuse to investigate citizen allegations that a coal operator is conducting mining operations without a permit—on the incredible theory that the State has no obligation to inspect because it has not issued a permit for the mine;
- Today, OSM's Virginia field office continues to ignore a citizen request for inspection and enforcement in the same matter, even though the time for responding under OSM's regulations has long since expired, and OSM continues to question in other proceedings whether the agency must make any response at all to a citizen complaint that OSM deems insufficient—even a response that simply informs the complainant of OSM's view;
- Today, coalfield citizens in West Virginia face the crippling expense and uncertainty of a second round of administrative hearings in two appeals before a so-called "multiple interest" board, solely because the testimony of State and industry witnesses in the initial hearings did not support legal arguments that the state regulatory authority subsequently dreamed up in a desperate attempt to prevail;
- Today, citizens throughout America's coalfields are compelled to address environmental problems caused by surface coal mining operations under the Clean Water Act, the Resource Conservation and Recovery Act, or other federal statutes because the courts have foreclosed the use of the Surface Mining Act's citizen suit provision against state regulators who fail to perform mandatory duties that the Surface Mining Act imposes on them.

To restore public participation as an effective supplement to governmental regulatory efforts and a means for securing appropriate oversight of state programs, I urge this Committee and the Congress as whole to investigate and then counteract agency stonewalling of information requests, unwarranted deference to state regulators by federal officials charged with oversight of state programs, the injustice of administrative review before state "multiple interest" boards, and judicial misinterpretation of the statute. I address each of these problems in turn.

Stonewalling Information Requests

Without ready access to permit applications, inspection reports, enforcement citations, and other documents generated in the regulatory process, the public cannot effectively participate in the regulatory scheme. For the most part, state regulatory authorities provide documents on request without significant delay and in convenient formats for the public's use. In marked contrast, OSM currently appears engaged in a puzzling effort to hamper citizen participation by denying information requests that state regulatory authorities fulfill routinely as a matter of ordinary business. As mentioned above, the agency continues to ignore its clear duty to produce permitting materials for New Mexico citizens concerned about mining operations on Indian lands in that State, where OSM is the regulatory authority.

In Tennessee, where OSM also is the regulatory authority, the agency has imposed an arbitrary two-day waiting period before it will allow any citizen to review permitting, inspection, or enforcement materials. Far worse, the agency has refused to allow citizens to speak with mining inspectors regarding on-the-ground conditions at mines that may adversely affect the citizens' interests. Conversations between citizens and mine inspectors employed by state regulatory authorities are commonplace and highly beneficial to all concerned, because mine inspectors often correct misunderstandings and, in other instances, confirm facts on which citizens subsequently rely in making inspection or enforcement requests.

The only conceivable reason for OSM's stonewalling of citizen requests for information about specific mining operations is to curtail or misdirect efforts by the public to participate in the regulatory scheme in the manner Congress expressly intended. In the interest of effective public participation, I ask this Committee to investigate the marked differences between OSM's performance in this area and that of state regulatory authorities and then to take appropriate action to cause OSM to provide requested information without undue delay or restriction.

OSM's Unwarranted Deference to State Regulators

After noting that "[e]ffective enforcement is central to the success for the surface mining control program contemplated by H.R. 2," this Committee's report on the bill that became the Surface Mining Act emphasized that "a limited Federal over-

sight role as well as increased opportunities for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal [State] enforcement are not repeated." The essence of both effective Federal oversight and citizen supplementation of governmental enforcement is a thorough, independent assessment by OSM of whether a violation exists and whether prescribed remedial measures are adequate to correct it.

To oversee a state enforcement program effectively in the context of a citizen's request for inspection and enforcement, OSM must take a critical, independent look at the State's response to each ten-day notice. Where any doubt remains whether an alleged violation actually exists or whether prescribed remedial action is sufficient to correct a violation, OSM can meet the Surface Mining Act's enforcement mandate only by conducting a federal inspection and deciding the matter on the basis of OSM's independent evaluation of the facts and the law. If OSM merely defers to the State in resolving doubts about the validity of a citizen complaint, the agency will, for that reason alone, overlook a multitude of violations that an independent assessment of the facts and the law would detect.

Despite this straightforward principle, OSM in 1988 formally adopted the "arbitrary or capricious" standard for evaluating the responses of state regulatory authorities to ten-day notices that OSM issues in response to citizen requests for inspection and enforcement action. From that point forward, OSM has systematically relied on the "arbitrary and capricious" standard as a basis for preferring a State's paper denial that a violation exists over a citizen's assertion to the contrary. In such situations OSM refuses to conduct the federal inspection necessary to a make a thorough, fully informed, and independent assessment of whether the citizen's complaint is valid. Indeed, under OSM's current standard for evaluating state responses to citizen complaints, the agency rarely, if ever, permits the complaining citizen to rebut the State's assertions. As a result, citizen efforts to supplement or strengthen enforcement of the Surface Mining Act are often stymied without the federal inspection that Congress intended OSM generally to make.

Section 521(a) of the Surface Mining Act, which prescribes the ten-day notice process, contains not one word authorizing OSM to defer to the response of a state regulatory authority where doubt remains regarding the existence of a violation or the effectiveness of remedial action that a State has ordered where the violation is not in doubt. The statute authorizes OSM to decline to inspect only where a State's response to a ten-day notice firmly establishes either that the State has taken appropriate action to cause the violation to be corrected or that the State has "good cause" for failing to take such action.

Deference to the views of state regulatory officials is inherently incompatible with the vigorous, independent oversight process that Section 521(a) prescribes. This is so because deference requires OSM to accept a State's ten-day notice response even where, on balance, OSM would decide the matter differently. Both OSM's role as watchdog of America's coalfields and the need for effective citizen participation in enforcing the Surface Mining Act demand that OSM inspect in such circumstances and respond based on conditions on the ground rather than simply defer to whatever view State officials may express on paper.

To revive effective public participation in overseeing state efforts to enforce the requirements of the Surface Mining Act, I urge this Committee and Congress to consider and enact an amendment to the statute which forbids OSM from deferring to the responses of state regulatory authorities to ten-day notices. The Committee and Congress should require instead that OSM conduct a federal inspection wherever a State's response does not demonstrate to a certainty that an alleged violation does not exist or that there is no need for additional remedial measures.

The Injustice of Administrative Review Before State "Multiple Interest" Boards

Where OSM is the regulatory authority or acts in its oversight capacity, citizens may obtain administrative review of adverse agency decisions before full-time administrative law judges who are free of any conflict of interest in matters that come before them and who generally have sufficient training and resources to provide effective review consistent with the due process of law. In marked contrast, administrative review of the decisions of many state regulatory authorities occurs before "multiple interest" boards whose members are not "employees" of the regulatory authority for conflict-of-interest purposes and who, in fact, own coal mines or are employed by those who do. Although such boards typically have one or more members drawn from environmental protection organizations, State multiple interest boards are generally, if not uniformly, dominated by majorities drawn from the coal industry, consultants to the coal industry, and other pro-development interests. As a re-

sult, citizens are compelled to seek administrative review of adverse permitting or enforcement decisions before tribunals that are manifestly biased against them.

Wholly apart from pro-industry bias, State multiple interest boards typically do not have a majority of members who have the necessary training or experience to conduct evidentiary hearings or to issue review decisions in a manner consistent with the requirements of applicable administrative procedure statutes. Consequently, citizens who seek review before these boards are often prohibited from introducing vital evidence or else see the board wholly ignore citizens' evidence in reaching a decision. The procedural errors that these boards routinely commit in conducting hearings and issuing decisions trigger judicial review in an inordinately large number of cases, no matter who prevails before the board. Judicial review in such circumstances results only in remand to the multiple interest board for yet another hearing and decision, with no promise that the second round will not end up as procedurally flawed as the first.

For all these reasons, state multiple interest boards are where public participation in state regulatory programs comes to die. The substantial financial expense and time investment necessary to pursue administrative review in the first place becomes overwhelming to citizens where review results in procedurally flawed decisions that must be reviewed again once they are overturned on judicial review. As mentioned earlier, one multiple interest board has recently ordered a second round of hearings in two appeals for the sole stated reason that the record made in the first round of hearings did not support arguments that the State's lawyers later decided to make. Add to all this the fatal anti-citizen bias of these boards and it is easy to see why citizen participation in States that have multiple interest boards does not accomplish what Congress hoped.

To secure the benefit of meaningful public participation in all state regulatory programs, I urge this Committee to investigate the role of multiple interest boards in stifling effective citizen involvement. Based on that investigation, I urge the Committee and the Congress to amend the Surface Mining Act to prohibit multiple interest boards from conducting administrative review of the decisions of state regulatory authorities and to require instead that administrative review occur before administrative law judges who are free of conflicts of interest and who are adequately trained to conduct hearings in accordance with state administrative procedure requirements.

Judicial Misinterpretation of the Surface Mining Act's Citizen Suit Provision

In reporting the bill that became the Surface Mining Act, this Committee found that "providing citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act." Accordingly, the Surface Mining Act includes a provision authorizing any adversely affected person to bring an action in federal court to compel "the appropriate State regulatory authority" to perform any act or duty under the statute which is not discretionary.

From enactment of the statute until 2003, citizens brought actions under the Surface Mining Act's citizen suit provision which resulted in settlements or court orders that corrected a host of shortfalls on the state level and strengthened overall administration of the statute. Beginning in 2003, however, a string of judicial decisions has misinterpreted the scope of the citizen suit provision and rendered its authorization of actions against state regulatory authorities virtually a dead letter.

These decisions mistakenly construe state regulatory programs that implement the Surface Mining Act as purely state law rather than as both state law and federal law by virtue of the Secretary's approval of them and their codification in the Code of Federal Regulations. Based on the misinterpretation of state regulatory programs as purely state law, the pertinent judicial decisions reason that the Eleventh Amendment bars actions that the Surface Mining Act expressly authorizes citizens to bring against State officials. Accordingly, these decisions close the federal courts to citizen suits that would otherwise identify regulatory lapses on the part of State officials and compel them to correct those lapses.

To restore the ability of citizens "keep regulators on their toes" and ensure implementation of state regulatory programs in accordance with the requirements of the Surface Mining Act, I urge this Committee and Congress as whole to consider and enact appropriate amendments to correct, in any one of several possible ways, the judicial misinterpretation of statute I have just described. The viability of public participation in the oversight of state programs depends on the enactment of such an amendment as soon as possible.

Conclusion

I thank the Committee for the opportunity to address these issues, and I look forward with hope to the Committee's response. If I may provide additional information, I will be pleased to do so on request.

[Additional information submitted for the record by Mr. Morris follows:]

MORRIS LAW OFFICE, P.C.
POST OFFICE BOX 6804
CHARLOTTESVILLE, VIRGINIA 22906

1901 PHEASANT LANE
CHARLOTTESVILLE, VIRGINIA 22901

TELEPHONE (434) 293-6616
FACSIMILE (434) 293-2811
E-MAIL wmorris@charlottesville.net

July 26, 2007

VIA U. S. MAIL AND ELECTRONIC MAIL

The Honorable Nick J. Rahall, II
Chairman, Committee on Natural Resources
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Yesterday, in testifying before your committee as part of "The Surface Mining Control and Reclamation Act of 1977: A 30th Anniversary Review", I stated that, based on a report I received from attorney Joseph Lovett, OSM's Virginia field office had failed to respond in a timely manner to a citizen request for inspection and enforcement alleging that an operator is conducting surface coal mining operations without a permit. Upon returning to my office last night, I received an electronic mail message from Mr. Lovett forwarding a copy of an apparently timely response that OSM made to the citizen complaint in question. I attach OSM's response to this letter. Information in the message to Mr. Lovett indicates that his computer received it while he was traveling to Washington to testify at the hearing. Therefore, neither Mr. Lovett nor I knew at the time of the hearing that OSM had in fact responded to the citizen's complaint.

Although I believe that I took reasonable and appropriate measures to verify my statement before testifying to the committee, I regret that my testimony on this subject was in error. Mr. Lovett has asked that I convey his regret as well. I am forwarding a copy of this letter to OSM with apology.

I understand that you have left the record of the hearing open for ten days to receive additional materials. Respectfully, I ask that you include this letter in the record as a correction to the written statement I submitted.

Thank you for inviting me to testify at the hearing yesterday.

Sincerely,

Walton D. Morris, Jr.

Walton D. Morris, Jr.

Enclosures

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
1941 Neeley Road, Suite 201
Big Stone Gap, Virginia 24219

July 2, 2007

Kathy R. Selvage
6611 Kemper Road
Wise, VA 24293

Dear Mrs. Selvage:

Thank you for your letter dated June 28, 2007. Your letter has been assigned tracking number CC07-130-001.

Your letter alleges violations of the Surface Mining Control and Reclamation Act (SMCRA). In accordance with the SMCRA, we have requested that the Virginia Division of Mined Land Reclamation (DMLR) investigate your allegations. Enclosed is a copy of the Ten-Day Notice, sent to DMLR, which outlines the violations we believe you allege. DMLR has ten days to investigate and take appropriate action to cause the alleged violations to be corrected or to show good cause for not taking action. Appropriate action and/or good cause is defined in the Federal regulations as a response from the DMLR "...that is not arbitrary, capricious, or an abuse of discretion under the State program..." If DMLR does not respond to us within ten days, take appropriate action, or show good cause; then a Federal inspection will be conducted.

As required by 30 CFR 842.12(d), you are advised that a Federal inspection will not occur within 15 days of receipt of your written concerns due to the processing times required for Ten-Day-Notice preparation, issuance, response, evaluation, and possible appeal by the State agency.

Upon final examination of the State's response, you will be promptly informed of the results. If a Federal inspection is necessary, you will be notified as far in advance as practicable and will be given the opportunity to accompany the Federal inspector on the inspection. Meanwhile, if you have any further questions concerning this process, please contact me on 276 523-4303.

Sincerely,

Tim T. Brehm

Tim T. Brehm
Reclamation Specialist

Enclosures

Jul 11 07 01:31p Kathy R. Salvage 2763281223 p.3

UNITED STATES DEPARTMENT OF THE INTERIOR
Office of Surface Mining
Reclamation and Enforcement

TEN-DAY NOTICE

Number X07-130-052-001 TV 1

Originating Office: Big Stone Gap Field Office
US DOI, Office of Surface Mining
1941 Neeley Rd., Suite 201
Compartment 116
Big Stone Gap, VA 24219

Telephone Number: (276) 523-4303

Ten-Day Notice to the State of VA

You are notified that, as a result of Citizen Information (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken.

Permittee: A & G COAL CORPORATION County: WISE
(Or Operator if No Permit)

Mailing Address: P.O. BOX 1010, Wise, VA. 24293

Permit Number: UNKNOWN Mine Name:

[X] Surface
[ ] Underground
[ ] Other

01 NATURE OF VIOLATION AND LOCATION:
Alleged operator has disturbed mine site prior to approval of surface mine permit by DMLR.

Section of State Law, regulation or Permit Condition believed to have been violated: 4 VAC 25-130-773.11(a)

NATURE OF VIOLATION AND LOCATION:

Section of State Law, regulation or Permit Condition believed to have been violated:

NATURE OF VIOLATION AND LOCATION:

Section of State Law, regulation or Permit Condition believed to have been violated:

Remarks or Recommendations:
Alleged disturbing mine site prior to approval of surface permit. Application #1003841
Alleged DMLR fail to conduct appropriate inspections.

Date of Notice: 07/02/2007
Certified Mail #
7006 0100 0006 4487 6278

Signature of Authorized Rep.: Tim Brehm

Print Name and ID: Tim Brehm ID# 052

Page 1 of 1

Jul 11 07 01:31p Kathy R. Selvage 2763281223 p.4

U. S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING
Mine Site Evaluation
State Program

1. Permittee/Person: A & G COAL CORPORATION	9. Permit Number: UNKNOWN	10. Permit Type: NP
2. Address: P.O. BOX 1010	11. Field Visit Date: 07/02/2007 (mm - dd - yyyy)	12. Purpose: CCR
3. City: Wise	13. SRA Present: N	
4. State: VA	14. Permit Status: NA	15. Site Status: NS
5. Zip Code: 24293	16. Facility Type: A	
6. Phone Number: (276) 328-3421	17. OSM Office #: 130	18. CCID #: CC07-130-001
7. Operator Name, if Different than Permittee	19. Land Code: S	
8. Mine Name	20. M.S.H.A ID #:	21. State Abrev.: VA
	22. County Name: WISE	
	23. AVS Permittee Entity ID Number: 119030	24. State Office:

25. Hours		26. Signature Block	27. Reviewing Official:
2.0	a. Permit Review	Signature: Tim Brehm	Signature:
0.0	b. Site Visit Time	Tim Brehm ID # 052	Review Date: 7 12 07 (mm - dd - yyyy)
0.0	c. Travel Time	Printed Name:	Is Supplemental MSE Page Used Y/N: Y
2.0	d. Report Writing	Date: 07/02/2007	

Permit Type — Item 10 IP = Interim Program, PP = Permanent Program, NP = No Permit

Purpose Type Codes Item 12

Ovsc... Oversight
Asst... Assistance
RFx.... Reclamation Fees
Fdx..... Federal Actions
CCR.... Citizen Complaint Referral (non site visit)
CC..... Citizen Complaint (Initial site visit)
CCF.... Citizen Complaint Follow-up

Joint Inspection — Item 13 A joint inspection is when a state inspector accompanies an OSM inspector any time during the review of the mine site.

Permit Status — Item 14

A.... Active: Coal mining and reclamation activities occurring or permitted but not yet disturbed.
IN.... Inactive (Permanent Program Permit): Phase II completed or Temporary Cessation of Operations. (Interim Program Permit) Coal mining completed and reclamation activities initiated.
BR... Bond Release: Reclamation completed and State Regulatory Authority (RA) has released all of the bond (Phase III Release.)
AB.... Abandoned: All surface and underground coal mining activities have ceased and operator has left the site without completing reclamation as defined in 30 CFR 840.11(g)
AB1.. Bond Forfeiture: Bond forfeiture officially in process or completed, and reclamation in progress or not yet commenced.
AB2.. Partially Reclaimed Forfeiture: Forfeited site where all bonds have been used to reclaim site, but site not reclaimed to Program standards.
AB3.. Reclaimed Forfeiture: Forfeited site that has been reclaimed to Program standards.
NA.... Not Applicable: When site is unpermitted.

Site Status Codes — Item 15

ND... No Disturbance: No coal mining and reclamation operations have been started.
EX... Coal Exploration: Coal exploration operations have started and where coal mining operations have not begun.
AP.. Active Coal Producing: Coal surface mining activities are occurring.
AN.. Active Non-Producing: Active non-producing facility such as tipple or preparation plant.
NM.. No Mining: The Permit Status is active, site is not in Temporary Cessation, no surface coal mining activity, and site not regraded.
MC.. Mining Complete: No mining activity on site, site regraded and awaiting phase bond release.
TC.. Temporary Cessation: The RA has granted cessation of mining pursuant to 30 CFR 816/817.131(b).
P1... Phase I Release: At least Phase I bond release granted for entire permitted area. For interim permits, partial bond release.
P2.. Phase II Release: At least Phase II bond release for the entire permitted area.
P3.. Phase III Release: Reclamation completed and the RA has released all bond.
NS.. Non-Site Visit: Status of site not determined.
FP.. Forfeiture Pending: The RA is pursuing actions to revoke the permit, collect the performance bond(s), and/or reclamation of forfeited site is in progress.
FR... Forfeited and Reclaimed: Forfeiture reclamation completed.
FO.. Abandoned Site: Abandoned site that is permitted but there is no bond.
WC.. Widcat: Coal mining and reclamation operations have or are taking place and the activity is not covered by the required permits from the RA.

Facility Type Codes — Item 16

A... Surface
B... Underground
C... Preparation Plant
D... Ancillary (Haulroad, Conveyor, and/or Rails)
E... Refuse and/or Impoundment
F... Loading Facility and/or Tipple
G... Stockpiles
H... Exploration Permits
I... Notice of Intent to Explore
J... Exempt 18 and 2/3
K... Government Financed Construction Exemption
L... Remining site permitted under 30 CFR 785.25

Small Business Regulatory Enforcement Fairness Act (SBREFA)
Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you are a small business (a business with 500 or fewer employees including those of affiliates) and wish to comment on the enforcement or compliance activities of OSM, call 1-888-REG-FAIR (1-888-734-3247)

U. S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING

Mine Site Evaluation — **State Program Continuation Page**

Permittee/ Person	A & G COAL	Permit Number	UNKNOWN	Field Visit Date	07/02/2007

28. Performance Standard Categories

Codes: 1=Compliance, 2=Noncompliance, 3=Not Planned, 4=Not Started, 5=Noncompliance Identified Elsewhere, 6=Previously Cited

A. Administrative
1. 2 Mining within Valid Permit
2. ___ Mining within Bonded Area
3. ___ Terms & Conditions of Permit
4. ___ Liability Insurance
5. ___ Ownership and Control
6. ___ Temporary Cessation
7. ___ AML Rec. Fees -- Non-Respondent
8. ___ AML Rec. Fees -- Failure to Pay

B. Hydrologic Balance
1. ___ Drainage Control
2. ___ Inspections & Certifications
3. ___ Siltation Structures
4. ___ Discharge Structures
5. ___ Diversions
6. ___ Effluent Limits
7. ___ Ground Water Monitoring
8. ___ Surface Water Monitoring
9. ___ Drainage -- Acid-Toxic Materials
10. ___ Impoundments
11. ___ Stream Buffer Zones

C. Topsoil & Subsoil
1. ___ Removal
2. ___ Substitute Materials
3. ___ Storage and Protection
4. ___ Redistribution

D. Backfilling & Grading
1. ___ Exposed Openings
2. ___ Contemporaneous Reclamation
3. ___ Approximate Original Contour
4. ___ Highwall Elimination
5. ___ Steep Slopes (includes downslope)
6. ___ Handling of Acid & Toxic Materials
7. ___ Stabilization (rills and gullies)

E. Excess Spoil Disposal
1. ___ Placement
2. ___ Drainage Control
3. ___ Surface Stabilization
4. ___ Inspections & Certifications

F. Coal Mine Waste (Refuse Piles/Impoundments)
1. ___ Drainage Control
2. ___ Surface Stabilization
3. ___ Placement
4. ___ Inspections and Certifications
5. ___ Impounding Structures

G. Use Of Explosives
1. ___ Blaster Certification
2. ___ Distance Prohibitions
3. ___ Blast Survey/Schedule
4. ___ Warnings & Records
5. ___ Control of Adverse Effects

H. ___ Subsidence Control Plan

I. Roads
1. ___ Road Construction
2. ___ Certification
3. ___ Drainage
4. ___ Surfacing and Maintenance
5. ___ Reclamation

J. Signs & Markers
1. ___ Signs
2. ___ Markers

K. ___ Distance Prohibitions

L. Revegetation
1. ___ Vegetative Cover
2. ___ Timing

M. ___ Postmining Land Use

N. Other

	General Performance Catagory	
1)	___	___
2)	___	___
3)	___	___

Performance Standard Catagories 30 CFR Counterpart

A. Administrative
1. Valid Permit 773.11
2. Mining within Bonded Area 773.11
3. Terms & Conditions of Permit 773.17
4. Liability Insurance 800.60
5. Ownership and Control 778.13
6. Temporary Cessation ..... 842.11(c) & 816/817.131
7. AML Rec. Fees -- Non-Respondant ..... 870.15(b)
8. AML Rec. Fees -- Failure to Pay ..... 870.15(a)

B. Hydrologic Balance ..... (816/817.41-57)
1. Drainage Control 45
2. Inspections & Certifications ..... 49(a)(10)
3. Siltation Structures 46
4. Discharge Structures 47
5. Diversions 43
6. Effluent Limits 42
7. Ground Water Monitoring ..... 41(c)
8. Surface Water Monitoring ..... 41(e)
9. Drainage--Acid - Toxic Materials ..... 41(f)
10. Impoundments 49
11. Stream Buffer Zones 57

C. Topsoil & Subsoil ..... (816/817.22)
1. Removal ..... 22(a)
2. Substitute Materials ..... 22(c)
3. Storage and Protection ..... 22(c)
4. Redistribution ..... 22(d)

D. Backfilling & Grading ..... (816/817.95-107)
1. Exposed Openings ..... 816/817.13, 14, 15, & 823.11 & 21
2. Contemporaneous Reclamation 100
3. Approximate Original Contour ..... 102(a)(1)
4. Highwall Elimination ..... 102(a)(2)
5. Steep Slopes (includes downslope) 107
6. Handling of Acid & Toxic Materials ..... 102(c)
7. Stabilization (rills and gullies) ..... 95(b)

E. Excess Spoil Disposal ..... (816/817.71-74)
1. Placement ..... 71(e)
2. Drainage Control ..... 71(f)
3. Surface Stabilization ..... 71(g)
4. Inspections & Certifications ..... 71(h)

F. Coal Mine Waste (Refuse Piles/Impoundments) ..... (816/817.81-84)
1. Drainage Control ..... 83(a)
2. Surface Stabilization ..... 83(b)
3. Placement ..... 83(c)
4. Inspections and Certifications ..... 83(d)
5. Impounding Structures 84

G. Use of Explosives ..... (816/817.61-68)
1. Blaster Certification ..... 61(c)
2. Distance Prohibitions ..... 61(d)
3. Blast Survey/Schedule 62-64
4. Warnings & Records ..... 66 & 68
5. Control of Adverse Effects 67

H. Subsidence Control Plan ..... (817.121-122)

I. Roads ..... (816/817.150-151)
1. Road Construction ..... 150(c)
2. Certification ..... 151(a)
3. Drainage ..... 150(b)-151(d)
4. Surfacing and Maintenance ..... 150(c)-151(d)
5. Reclamation ..... 150(f)

J. Signs & Markers ..... (816/817.11)
1. Signs ..... 11(a),(b),&(c)
2. Markers ..... 11(a),(b),(d),(e),&(f)

K. Distance Prohibitions ..... (761.11)

L. Revegetation ..... (816/817.111-116)
1. Vegetative Cover ..... 111 & 116
2. Timing 113

M. Postmining Land Use ..... (816/817.133)

Jul 11 07 01:32p Kathy R. Selvage 2763281223 p.6

U. S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING
Mine Site Evaluation

State Program Continuation Page

Permittee\ Person: A & G COAL CORPORATION | Permit Number: UNKNOWN | Field Visit Date: 07/02/2007

29. Off-Site Impact Data and Identified Violation Data.
List all Ten-Day Notice actions and all Federal NOV or CO actions taken or reviewed during this current OSM site visit. List the off-site impacts associated with either State or Federal actions taken during this site visit.

1. A. Specific State Law/Regulations Violated: 4 VAC 25-130-773.11(a)
B. Description: Alleged Operator has disturbed mine area prior to issuance of approved surface permit. (Application #1003841)
C. Performance Standard: A1 | D. Abated (Y/N): N
E. OSM Action: 2 | F. OSM Action Number: X07-130-052-001 | Viol.#: 01
G. Optional: | H. Any Off-Site Impacts Y/N: N
I. Latitude: °00'00" | J. Longitude: °00'00" | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

2. A. Specific State Law/Regulations Violated:
B. Description:
C. Performance Standard: | D. Abated (Y/N):
E. OSM Action: | F. OSM Action Number: | Viol.#:
G. Optional: | H. Any Off-Site Impacts Y/N:
I. Latitude: | J. Longitude: | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

3. A. Specific State Law/Regulations Violated:
B. Description:
C. Performance Standard: | D. Abated (Y/N):
E. OSM Action: | F. OSM Action Number: | Viol.#:
G. Optional: | H. Any Off-Site Impacts Y/N:
I. Latitude: | J. Longitude: | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

4. A. Specific State Law/Regulations Violated:
B. Description:
C. Performance Standard: | D. Abated (Y/N):
E. OSM Action: | F. OSM Action Number: | Viol.#:
G. Optional: | H. Any Off-Site Impacts Y/N:
I. Latitude: | J. Longitude: | K. Elevation:

L. Off-Site Impacts

	People	Land	Water	Structures
Blasting				
Stability				
Hydrology				
Encroachment				
Other				

OSM Action
1) Deferred to State Action
2) TDN Issued
3) NOV Issued
4) FTA-CO Issued
5) IH-CO Issued (Imminent Environmental Harm)
6) ID-CO Issued (Imminent Danger to Public)
7) Previously Cited by FA, Abatement Pending
8) Abated during or before OSM Inspection
9) Follow-up of Federal Action

Off-Site Impacts
For each type of impact and resource affected, enter 'N, D, or J' to describe the degree of off-site impact:
N - Minor Occurrence
D - Moderate Occurrence
J - Major Occurrence

Page 3 of 4
Revised December 4, 1998

Jul 11 07 01:32p Kathy R. Selvage 2763281223 p.7

Company: A & G Coal Corporation **Permit No:** Application #1003841 **Date:** 7/02/07

Narrative:

OSM Big Stone Gap Area Office received a written complaint on 7/02/07, which alleges A & G Coal Corporation has disturbed permit application #1003841 prior to permit issuance. This surface mine permit is located on the Ison Rock Ridge area near Appalachia, Virginia. The application is in the third permit review cycle by DMLR.

The citizen alleges the company has built roads and is clearing the mine area in anticipation of the surface mining. The citizen also alleges DMLR has failed to conduct appropriate inspections related to this subject disturbance.

This written complaint with Ten Day Notice X07-130-052-001 was forwarded to DMLR on 7/03/07 for investigation. The alleged violation involves disturbing the permit area prior to obtaining a permit under 4 VAC 25-130-733.11(a).

The CHAIRMAN. Joe.

STATEMENT OF JOE LOVETT, EXECUTIVE DIRECTOR, APPALACHIAN CENTER FOR THE ECONOMY AND THE ENVIRONMENT, LEWISBURG, WEST VIRGINIA

Mr. LOVETT. Good afternoon, Mr. Chairman, and thank you for the opportunity to appear here today.

First of all, after listening to OSM and state regulators here this morning, one would think that all is well with environmental regulation of coal mining in the Appalachian coal-bearing regions. Sadly, nothing could be further from the truth.

Bureaucratic double-speak and sugar-coating reclamation failures, and a few carefully chosen pictures, cannot change the facts. Mountaintop removal is destroying a huge swath of Appalachia forever, and the regulators are complicit in this disaster.

The Surface Mining Act is an imperfect, but useful, law. The problem is that the Bush Administration's OSM has completely refused to enforce that Act. The outright failure of OSM to carry out its duties is devastating our region. In fact, I believe that if OSM disappeared tomorrow, there would be no negative impact to the environment. OSM has become a useless agency, and as such, has rendered SMCRA itself useless.

Appalachian coal mining has worldwide effects. Burning coal from only three Appalachian states—West Virginia, Kentucky, and Virginia—accounted for approximately 15 percent of total CO_2 emissions generated in the entire United States from all fossil fuels in 2001. Burning coal produces more CO-2 per BTU than any other energy source, and now accounts for more than 50 percent of U.S. electricity consumption.

If you care about the future of our planet's climate, you must care about burning coal. Coal to liquids would be an added insult to our region. CO-2 produced from coal to liquids is tremendous, but it would also exacerbate mountaintop removal mining.

The coal-rich mountains of central Appalachia are home to generations-old communities, and contain beautiful hollows through which thousands of miles of pristine and ecologically rich mountain streams flow. Mountaintop removal mining carelessly lays waste to our mountain environment and communities.

This deforestation is not only an ecological loss, but is a permanent blow to a sustainable forest economy in a region in desperate need of long-term economic development. Mountaintop removal has already transformed huge expanses of one of the oldest mountain ranges in the world, into a moonscape of barren plateaus and rubble.

Appalachian coal is cheap only because OSM and other agencies ignore their duty to enforce the Act, and allow the coal industry to pass its costs on to workers, communities, and local and state economies, as well as the environment. The mining industry naturally takes advantage of the Federal regulators' failure to enforce the law. One of the worst consequences of OSM's disregard of the law is the prevalence of these mountaintop removal mines, and the attendant large valley fills.

Mountaintop removal mines are changing the landform of our region in a way more profound than any change occurring in the

United States. A recent study singles out mountaintop removal and valley fills in West Virginia and adjacent states as by far the greatest contributor to earth-moving in the United States.

Mountaintop removal and other large surface mining operations have been authorized by permitting authorities that have allowed the destruction of over 2,000 miles of our streams, and have allowed the destruction of over a million acres of our forests. These headwater streams and forests, the most productive and diverse tempered hardwood forests in the world, are valuable long-term economic assets that are being lost forever. Future generations will not forgive us for what we are now doing to the Appalachian Mountains.

In a few decades we have destroyed mountains and forests that have taken hundreds of thousands of years to create. Appalachian mining may cumulatively impact 1.4 million acres, or 11.5 percent of the area being mined, according to a Federal EIS.

I will just touch on one big problem with the OSM's regulation, and that is its failure to enforce the rules requiring restoration to approximate original contour. The Act requires that the post-mining land generally resemble the surface configuration of the premining land. Anybody can look at these mines and know that is not the case. The valley fills that are part of these operations look like no landscape on earth, much less like our Appalachian Mountains.

The agency's continued issuance of these permits is a clear violation of the Act. There are several other violations of the Act cited in my statement, written statement, and I won't bother to go through them here.

I will just summarize by saying that what we heard about reclamation here today is also a sham, and I would like to take the opportunity to invite members of this committee and its staff to come to West Virginia to witness the devastation caused by these mountaintop removal mines, and appreciate the incalculable harm that OSM's failure to enforce the Act has done to our region.

Contrary to what we heard OSM say here today, and what you will undoubtedly hear from the industry, reclamation, to put it kindly, is a joke in our state. You need to see it to believe it.

Thank you for your time.

[The prepared statement of Mr. Lovett follows:]

Statement of Joe Lovett, Executive Director,
Appalachian Center for the Economy and the Environment

Introduction

Good morning Chairman Rahall and members of the Committee. Thank you for the opportunity to testify today. My name is Joe Lovett and I am the Executive Director of the Appalachian Center for the Economy and the Environment, a law and policy center located in Lewisburg, West Virginia. I am also a lawyer who has been attempting to enforce surface coal mining and other environmental laws that federal and state regulators refuse to enforce in Appalachia.

From its inception in 2001, the Appalachian Center has been at the forefront of the battle to end the abuses associated with the devastating method of coal mining known as mountaintop removal. The Center serves low-income citizens, generations-old communities, and local and grassroots groups of central Appalachia.

Unfortunately, it is necessary for us to direct much of our work to rein in federal agencies, whose refusal to enforce environmental laws in our region permits the environmental devastation and community destruction that results from mountaintop removal coal mining.

In the abstract, the Surface Mining Control and Reclamation Act is an imperfect but useful law. Since at least 2001, however, the Office of Surface Mining Reclamation and Enforcement has refused to enforce the Act. The outright failure of OSM to carry out its duties has had devastating impacts on Appalachia.

Appalachian coal has world-wide effects: burning coal from only three Appalachian states (West Virginia, Kentucky, and Virginia) accounted for approximately 15% of the total CO_2 emissions generated in the entire United States from all fossil fuel sources (including petroleum) in 2001. Burning coal produces more CO_2 per BTU than any other energy source and now accounts for more than 50% of U.S. electric consumption.

The local impacts of coal mining, particularly mountaintop removal mining, are just as devastating to the environment of the Appalachian region as coal burning is to the global climate.

The coal-rich mountains of central Appalachia are home to generations-old communities and contain beautiful hollows through which thousands of pristine and ecologically rich mountain streams flow. Mountaintop removal mining carelessly lays waste to our mountain environment and communities. The deforestation is not only an ecological loss, but a permanent blow to a sustainable forest economy in a region in desperate need of long-term economic development. Mountaintop removal has already transformed huge expanses of one of the oldest mountain ranges in the world into a moonscape of barren plateaus and rubble.

Appalachian coal is "cheap" because OSM ignores its duty to enforce the Act and allows the coal industry to pass its costs onto workers, communities, local and state economies, and the environment. The mining industry naturally takes advantage of federal regulators' failure to enforce the law. One of the worst consequences of OSM's disregard for the law is the prevalence of mountaintop removal mines, large strip mines with attendant valley fills.

Mountaintop Removal Coal Mining

Disregarding human and environmental costs, mountaintop removal coal mining as currently practiced in Appalachia eradicates forests, razes mountains, fills streams and valleys, poisons air and water, and destroys local residents' lives. Toxic mine pollution contaminates streams and groundwater; hunting and fishing grounds are destroyed. Because the large-scale deforestation integral to mountaintop removal takes away natural flood protections, formerly manageable storms frequently inundate and demolish downstream homes.

Mountaintop removal mines are changing the landform of our region in a way more profound than is occurring in any other area. A recent study singles out mountaintop removal mining and valley fills in West Virginia and adjacent states as by far the greatest contributor to earth moving activity in the United States. Hooke, R.L. 1999, "Spatial distribution of human geomorphic activity in the United States: Comparison with rivers, Earth Surface Processes and Landforms 24: 687-92. In other words more earth is moved in this region than in intensively developed areas like southern California or the Northeast corridor.

Mountaintop removal and other large scale surface mining operations have been authorized by permitting authorities that have allowed the destruction of over 2,000 miles of Appalachian streams and more than 1,500 square miles of forested mountain terrain. These headwater steams and forests (the most productive and diverse temperate hardwood forests in the world) are valuable long-term economic assets to the local communities and to the Nation and are being forever lost.

Environmental Impact Statement on Mountaintop Removal

Because of litigation that I brought in 1998, a programmatic Environmental Impact Statement on mountaintop removal was performed by EPA, the Army Corps of Engineers and OSM. The EIS found that present and future mining in Appalachia may cumulatively impact 1.4 million acres, or 11.5% of the study area, and that the destruction of these nearly 1.5 million acres of forest is profound and permanent because "unlike traditional logging activities associated with management of hardwood forest, when mining occurs, the tree, stump, root, and growth medium supporting the forest are disrupted and removed in their entirety."

The EIS also determined that mountaintop removal mining causes "fundamental changes to the terrestrial environment," and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions. Further, mining impacts on the nutrient cycling function of headwaters streams "are of great concern" and mining impacts to habitat of interior forest bird species could have "extreme ecological significance."

The EIS further concluded that mining could impact 244 terrestrial species, including, for example, 1.2 billion individual salamanders, and that the loss of the ge-

netic diversity of these affected species "would have a disproportionately large impact on the total aquatic genetic diversity of the nation." Finally, the EIS observed that valley fills are strongly associated with violations of water quality standards for selenium, a toxic metal that bioaccumulates in aquatic life. All 66 selenium violations identified in the EIS were downstream from valley fills, and no other tested sites had selenium violations.

OSM's response to these devastating conclusions was to further weaken its enforcement of the Act in Appalachia.

In 2001 and 2002, the federal agencies responsible for regulating mountaintop removal weakened the EIS and did not proceed with necessary scientific studies when they realized that the science was showing that mountaintop removal could not be practiced without devastating the environment and economy of our region. The agencies simply halted the economic study that was crucial to the EIS when it became apparent that the results were not what OSM wanted them to be.

In sum, the EIS was supposed to demonstrate the environmental and economic impacts of large scale strip mining on Appalachia and propose ways to protect the environment and mitigate the impacts of mining on the region. In spite of the fact that the environmental studies that were performed all showed significant harm to the environment, OSM guided the other agencies involved to make permits easier for mining operators to receive. OSM ignored the science and turned the EIS on its head.

Because of OSM's role in this process, we still desperately need an adequate and impartial EIS to be performed to demonstrate the far reaching impacts this form of mining is having on the Appalachian region.

Approximate Original Contour

The heart of the Surface Mining Control and Reclamation Act is the requirement that mining companies must restore surface mines to approximate original contour, or AOC. If mines are restored to AOC, the disturbed area is smaller, valley fills and stream impacts are reduced. The Act provides that approximate original contour is the surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain.

Remarkably, there are few, if any, large surface mines in Appalachia that comply with this basic requirement. Instead, mining operators, with the acquiescence of OSM, thumb their noses at the law and create monstrous valley fills and sawed off mountains that more closely resemble the surface of the moon than our lush, green hills.

Mountaintop removal mines are not required to restore the post mining site to AOC. The Act sanctioned mountaintop removal mining, but only in very limited circumstances. The Act requires that all mines be restored to AOC unless the mining company shows that it will restore the site to an industrial, commercial, agricultural, residential, or public facility (including recreational facilities) use.

Almost no postmining land in Appalachia is put to any of these uses. The post mining land is in isolated mountain areas, the land is unstable for building and it will no longer support native vegetation. There is no surface or groundwater available on the post mining sites because the mountain has been blown to bits. In short, mountains and valleys have been changed dramatically in contour so that they resemble no surface configuration on Earth and the land is useless for future development. Whether the mines are technically "mountaintop removal mines" or not (and OSM has so bent the definition of "mountaintop removal" that not all mines that have the affect of mountaintop removal mines are classified as such), almost all Appalachian surface mines fit this description. OSM has not lifted a finger to stop this complete abuse of the most important provision of the Act.

Stream Buffer Zone

Another of the most important provisions of the Act requires that no mines be permitted unless they prevent material damage to the hydrologic balance off site and minimize disturbance on site. OSM promulgated the stream buffer zone rule in 1983 to carry out the Congressional mandate to protect the hydrologic balance.

The buffer zone rule, 30 C.F.R. 816.57, states that no land within 100 feet of a perennial stream or an intermittent stream may be disturbed by surface mining unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not

adversely affect the water quantity and quality or other environmental resources of the stream.

On its face, this rule prohibits valley fills in intermittent and perennial streams and, in 1999, a federal judge in West Virginia agreed that this is what the rule means. That decision was reversed on appeal for purely procedural reasons—the Court of Appeals did not reach the merits.

To protect the coal industry, OSM is in the process of trying to promulgate a new and weaker rule to override this 25 year old rule. It is absurd to allow, as OSM has, more than 2,000 miles of mountain streams to be permanently buried beneath mining waste and still claim to be protecting the hydrologic balance. Rather than weakening the rule to accommodate the mining industry, a responsible agency would force the industry to conform to the law.

Cumulative Hydrologic Impacts

OSM is also charged with protecting the cumulative hydrological integrity of the mining region. Again, OSM utterly fails to discharge its duty to assure that states are performing adequate cumulative hydrological impact analyses as the Act requires. For example, according to information released by the Corps, by 2001 as much as two percent—1,208 miles—of streams in Appalachia had been buried or directly harmed by valley fills and over 1.5 million acres of forest had been destroyed. This amounts to 11.5 percent of the land area in the region encompassing eastern Kentucky, southern West Virginia, western Virginia, and areas of eastern Tennessee. As a result of this destruction of headwater streams, mountaintop removal mines cumulatively devastate aquatic ecosystems. OSM has not attempted (and has not forced the states to attempt) to analyze and minimize the environmental harm of past, present, and reasonably foreseeable future surface mining operations in Appalachia. These impacts include total elimination of all aquatic life in buried streams, negative impacts on the proper functioning of aquatic ecosystems (including fisheries located downstream of mountaintop removal mining operations), and impairment of the nutrient cycling function of headwater streams.

For example, in the Coal River watershed in West Virginia, existing and pending surface mining permits cover 12.8% of the watershed. In the Laurel Creek of the Coal River watershed, existing and pending surface mining permits cover 28.6% of the watershed. Surface mining permits including valley fills cover 14.5% of first order streams and 12% of all streams in the Coal River watershed and surface mining permits including valley fills cover 37.3% of first order streams and 27.9% of all streams in the Laurel Creek watershed.

The United States Fish and Wildlife Service recognizes that mountaintop removal mining results in forest loss and fragmentation that is significant not only within the project area, but also regionally and nationally. In particular, the mines cause a fundamental change in the environment from forestland to grassland habitat, cause significant adverse impacts to the affected species, cause loss and/or reduced quality of biodiversity, and cause loss of bird, invertebrate, amphibian, and mammalian habitat.

When Congress passed the Surface Mining Control and Reclamation Act in 1977, it thought that it was enacting a law to protect the environment and citizens of the region. OSM has used, and has allowed the states to use, the Act as a perverse tool to justify the very harm that Congress sought to prevent. The Members of Congress who voted to pass the Act in 1977 could not have imagined the cumulative destruction that would be visited on our region by the complete failure of the regulators to enforce the Act.

Higher and Better Use and Topsoil

The Act requires that all postmining sites be restored either to conditions that are capable of supporting the uses they were capable of supporting before any mining or to higher or better uses. The Act also requires operators to save and replace the topsoil found on the mining site.

Again, OSM's record here is dismal. Our mountains have been reduced to scrubland that will not support native hardwood tree species. Far from requiring a higher or better use of that land, OSM has acquiesced to allowing operators to turn the most productive temperate hardwood forests in the world into useless and unproductive grasslands. One of the reasons for the sham reclamation practices that are common practice on Appalachian surface mines is OSM's failure to assure that operators save and reuse the topsoil. Very few, if any operators, save the topsoil as the law requires. Instead, they are permitted to use "topsoil substitutes" and dump the irreplaceable topsoil into the bottoms of valley fills.

Economics

Mountaintop removal is also devastating the economy of the coal bearing regions of Appalachia. In 1948, there were 125,669 coal mining jobs in West Virginia and 168,589,033 tons of coal mined. In 1978, there were still 62,982 coal mining jobs in West Virginia with only 84,696,048 tons mined. By 2005, however, only 17,992 of these jobs remained despite the fact that coal production had again risen to 159,498,069 tons mined.

So, although coal production today is roughly the same as it was sixty years ago, the number of coal mining jobs has decreased by more than 85%. This job loss has been driven not by environmental production or decreased production, but by coal operators themselves who have replaced workers with machines and explosives. McDowell County, which has produced more coal than any other county in West Virginia, is now one of the poorest counties in the Nation. Far from being an economic asset to communities, mountaintop removal devastates economies wherever it occurs.

Summary

With increasing global demands for energy, the oppressive influence of "big coal" has not weakened in our region since 1977. As the price of coal increases and so-called "clean coal" and coal conversion technologies are promoted, the pressure to evade the law and recklessly permit mines will increase. The peak of world oil production, the political vulnerability of the world's oil supply, and the increased price of oil has quickly transformed the economics of the "coal to liquids" industry. The United States has the largest coal reserves in the world and we must control ourselves to protect the Earth and our region.

There is no such thing as "clean coal." Increased burning or liquefying of coal will produce unsustainable levels of carbon dioxide. Mountaintop removal mining destroys forever central Appalachia's communities, forests, streams, and wildlife. The region is a "hot spot" for migratory birds and the giant holes now being opened in the forest canopy by mountaintop removal mining are devastating important populations of migratory birds. To compound the problem, as the price of coal rises, coal operators are today mining coal that until now was too expensive to recover in the past. As the price of coal increases or as mining technology becomes more "efficient," coal seams that were off limits in the past are coming on line. Mining those more "marginal" seams is even more environmentally harmful as coal operators are able to blow up more mountains and move more earth to get at ever thinner and deeper coal seams. The nation is at a tipping point on energy and climate change policy and the impacts of coal mining on Appalachia are an essential consideration in the development of an environmentally responsible energy policy.

Conclusion

I am pleased to see that this Committee is conducting this hearing on the thirtieth anniversary of the Act. I hope that it will actually take action to compel OSM to discharge its duties. The absence of energetic oversight invariably leads to problems, particularly with agencies like OSM that have close ties with the industries that they regulate.

Finally, I would like to take this opportunity to invite members of the Committee and its staff to travel to West Virginia to witness the devastation caused by mountaintop removal to help you appreciate the incalculable harm that OSM's failure to enforce the Act has done to our region. We would be pleased to provide flyovers of mountaintop removal areas and to arrange meetings with community members whose lives and property are severely impacted by the illegal mountaintop removal mines that OSM refuses to regulate.

The CHAIRMAN. Mr. Wright.

STATEMENT OF BRIAN WRIGHT, COAL POLICY DIRECTOR, HOOSIER ENVIRONMENTAL COUNCIL, INDIANAPOLIS, INDIANA

Mr. WRIGHT. Thank you for this opportunity to speak. My name is Brian Wright; I am the Coal Policy Director for Hoosier Environmental Council, a statewide organization in Indiana that represents over 25,000 members.

In the nine years that I have worked for the Council, I have spent thousands of hours reviewing mining permits, ground-to-sur-

face-water monitoring records, and scientific studies and government reports on the disposal of coal combustion waste in mines. I have also spoken with numerous citizens in Indiana and across the country on the impacts of mining on their homes, quality of life, and environment.

I have come here to speak on behalf of residents in the Illinois coal basin, which stretches from Illinois into southwest Indiana.

While SMCRA has addressed some of the most damaging mining practices within the coal basin, coalfield residents must still contend with contamination, loss of local groundwater, lasting damage to homes, unresponsive regulatory agencies, large-scale open dumping of coal combustion waste in the mines, and growing concern about damage from longwall mining.

In 1977, the U.S. Congress decided that it would no longer allow the coalfields of this country to be treated as sacrifice zones, and coalfield residents to be treated as second-class citizens. So has SMCRA lived up to these intended purposes in the Illinois coal basin? It has the skeleton of a good law, but in many areas SMCRA still lacks the muscles and teeth needed to adequately protect coalfield communities and their environment.

For example, SMCRA lays the groundwork for good groundwater protection, but the language in SMCRA remains too vague to offer meaningful protection for this vital resource.

As you brought up earlier with the language of the approximate original contour and the fact that it has never been clearly defined in the law, SMCRA and Federal regulations have never defined the provisions and requirements for groundwater protection.

SMCRA requires mines to minimize disturbance within the mined area to the hydrologic balance, and prevent material damage outside of the mine to groundwater, but has never defined either of these terms. As a result, state agencies have been given too much wiggle room in how to interpret these standards.

Illinois and Indiana groundwater rules are written in such a way as to turn mine areas into sacrifice zones once again. During the mining process, no standards actually apply within the mined area. In the case of Indiana, any contamination that occurred in the mine would have to migrate 300 feet beyond the mine area and all the mine operations before any regulatory action would be applied. By that time, the contamination would be so well established that it would be extremely difficult to take any meaningful action.

Once bond release occurs, in both states the groundwater receives a permanent designation as impacted by the mines, and the groundwater standard within those mine permit areas becomes the amount of contamination caused by the mining. There is no numeric standard holding them to minimizing contamination within the mine area, or preventing material damage outside.

Both of these rules were given full approval by the Office of Surface Mining, despite their clear contradiction to the regulations and intent of SMCRA.

Coalfield residents are supposed to receive help from their state agencies when they have a complaint about blasting, water loss, or other damage from the mine. And regardless of the area of the country, the mining agency or official or the mining company involved, I have heard the same consistent story time and time again

from coalfield residents. No matter how well they can document the damage to their property, both the agencies and the mining companies continue to dismiss their complaints, or perform token actions which truly don't address the damage.

Citizens consistently find themselves placed in an adversarial relationship with the very agencies that are supposed to be protecting their interests.

In addition to all of these existing problems, coal mines in the Midwest and throughout the country are now being used as open dumps for vast quantities of coal combustion waste. SMCRA was never designed to regulate these types of dumping operations, and coalfield residents have been forced to fight an unjust double standard when it comes to dumping in minefields. Disposal practices that would not be allowed anywhere else—for example, mass dumping in direct contact with groundwater—are allowed in the coalfields, strictly on the basis the dumping is occurring in mines.

While OSM has called for a rulemaking on this practice, based on my experience with the Office of Surface Mining and state mining agencies coming from years of being involved in public forums, OSM conferences on mine disposal, and other rulemakings, state rulemakings throughout the last nine years, I can say with complete confidence that coalfield residents will not get meaningful protection for their health and their water unless you step in to demand that protection.

The very recommendations given in National Research Council's report on mine disposal are almost word-for-word regulations that citizens have been struggling for years to try and get in their own states, only to have OSM and state agencies fight them at every step of the way and oppose those types of safeguards. To now expect them to immediately do a 180-degree turn and turn around and support those recommendations from the National Research Council I found somewhat unbelievable.

Concern has come up that is not being taken care of in any way, shape, or form by the local agencies is underground longwall mining. This is a serious concern to the citizens I contacted in Illinois, getting prepared for this testimony.

Unlike traditional coal mining, longwall mines are allowed to completely collapse. This can lead to subsidence that can drop the ground as much as four to five feet on the surface. In Pennsylvania, subsidence from longwall mines has damaged homes, destroyed streams, and ruined farmland. The Illinois DNR refuses to accept any sort of regulatory authority over the surface impacts of these mines.

We ask that you please consider taking the following steps to give SMCRA the muscles and teeth it needs to adequately protect coalfield communities and their environment.

Number one. Defining what it means to minimize disturbances and prevent material damage to the hydrologic balance.

Create better oversight of the state agencies.

Require national regulations on mine disposal that at a minimum incorporate the recommendation of the National Research Council's report, managing coal combustion residues in mines.

And pass requirements to minimize surface impacts from longwall mining.

Thank you.
[The prepared statement of Mr. Wright follows:]

Statement of Brian Wright, Coal Policy Director, Hoosier Environmental Council

Members of the Natural Resources Committee:

Thank you for this opportunity to speak on this important issue. My name is Brian Wright. I am the Coal Policy Director for Hoosier Environmental Council, a statewide environmental organization in Indiana that represents over 25,000 members. In the 9 years I have worked for the Council, I have spent hundreds of hours reviewing permit applications and ground and surface water monitoring records for Indiana coal mines. I have spoken with numerous citizens in Indiana and across the country about the effects of mining on the property rights, quality of life, health, and environment, and witnessed first hand damage to homes that coalfield citizens assert is from blasting at nearby coal mines. I have also played a central role in national campaigns to create national regulations on the disposal of power plant wastes in coal mines.

Introduction

My comments are presented on behalf of coalfield residents and citizen advocacy groups in the Illinois coal basin. The basin stretches through southern Illinois and southwest Indiana. Mining in the area is mostly done by surface mining, but the number of underground mines is growing in both states. While SMCRA has addressed some of the most egregious mining practices, coalfield residents must still contend with contamination and loss of local ground water, blasting damage to homes, unresponsive regulatory agencies, large scale open dumping of industrial wastes into mines, and growing concern about subsidence from longwall mining.

In 1977, the U.S. Congress decided that it would no longer allow the coalfields of this country to be treated as sacrifice zones and coalfield residents to be treated like second class citizens. SMCRA was passed with the goal that the mined land be returned to original or better uses instead of being reduced to moonscapes, that ground and surface water quality and quantity be protected instead of being rendered too acidic to support life, and that the homes and quality of life of coalfield residents would be protected instead of damaged or destroyed in the name of extracting the coal. In order to ensure that SMCRA was carried out properly, requirements for public participation were put into place in order to ensure citizens could hold mining companies and state and federal agencies accountable when mining laws and regulations were not followed.

So how effective has SMCRA been in protecting the property rights, quality of life, and environment of the residents of the Illinois coal basin from modern day mining operations? SMCRA has the skeleton of a good law, but in many areas it lacks the muscles and teeth needed to adequately protect coalfield residents and the environment. In the rural areas where these mines are located, ground water most often makes up the only reliable source of water for residents. SMCRA lays the ground work for good ground water protection. However, the language in SMCRA remains too vague to offer meaningful protection to this vital resource.

The law contains protections for homes from blasting damage, but I have visited many homes and received many complaints from coalfield residents who watch as large cracks appear in their walls and their foundation after the mines move in. When they bring these damages to the attention of the state mining agency, the damage to their homes is dismissed as the house settling. In our experience, coalfield residents are left feeling despair and hopelessness as no amount of documentation or evidence seems to change the state agencies explanation to the damage to their homes.

Regardless of the area of the country, the mining agency or official, or the mining company, I have heard the same consistent story time and time again from coalfield residents: agencies and mining companies dismiss the complaints of citizens no matter how well they can document damage to their property. Whether it is an issue on blasting damage to homes, harm to wells, or a rulemaking issue, citizens consistently find themselves placed in an adversarial relationship with the very agencies that are supposed to be protecting their interests.

Citizens seeking relief through the permit appeal process find the deck stacked against them. Even in instances where citizens can clearly document where a permit application fails to meet state and federal requirements, the state agencies still consistently side with the mining company. Citizens are then forced into devoting scarce resources into fighting the uphill legal battle of convincing the agency's own judges that their agency has acted in error in granting a deficient permit.

Beyond these threats and challenges posed to coalfield residents, there are two practices never envisioned by the writers of SMCRA that are becoming increasingly common in the Illinois coal basin. Coal mines in the Midwest and throughout the country are being used as open dumps for vast quantities of power plant wastes. SMCRA was never designed to regulate these types of dumping operations. Coalfield residents have been forced to fight an unjust double standard when it comes to dumping in mines. Disposal practices that would not be allowed anywhere else such as disposal into direct contact with groundwater are allowed in the coalfields. The National Research Council, in their 2006 report "Managing Coal Combustion Residues in Mines", found that national regulations are needed to prevent harm to the health of coalfield residents and their environment.

Based on my experience with the Office of Surface Mining (OSM) and state mining agencies, I say with complete confidence that coalfield residents will not get meaningful protection for their health and their water unless you step in and demand that protection. For years, OSM and state agencies have fought against citizen requests for regulations similar to the recommendations made in the OSM report.

Mining companies in the Midwest are increasingly turning to underground mining. If these companies decide to use the longwall mining method, there are no federal laws or regulations in place to protect coalfield residents from the surface impacts of longwall mining. Unlike traditional coal mining, which leaves pillars in place to prevent collapse, longwall mines are allowed to collapse. This can cause the ground to drop as much as 4-5 feet. The subsidence from longwall mines has damaged homes, destroyed streams, and ruined farmland. The Illinois and Ohio Farm Bureaus have passed resolutions calling for regulations on longwall mining out of concern over the damage this mining method could cause to prime farmland and historic farms in the Midwest. SMCRA must be amended to regulate all surface impacts from underground mines. Otherwise, citizens are helpless towards protecting their property and their environment from the impacts of longwall mining.

Ground Water Protection

Federal mining regulations require that coal mines "minimize disturbance of the hydrologic balance within the permit and adjacent areas, prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses." (30 CFR Sec. 816.41) The regulations also require that the mine conduct a thorough, site specific analysis of the local ground and surface water resources, the cumulative hydrological impact assessment (CHIA). If the water source of a landowner does become contaminated, the mine owner is required to replace it. These requirements create the good framework for protection of ground water resources in the coalfields, but in reality these regulations have been inadequately applied in order to protect the water of coalfield residents in the Midwest.

SMCRA and its associated regulations have never defined what it means to minimize disturbance within the permit area or prevent material damage. As a result, state programs are given too much latitude in deciding when a problem actually occurs. The Indiana ground water rule (327 IAC 2-11) makes it almost impossible to properly enforce these regulations. While the mine operation is occurring, a ground water management zone is established that extends 300 ft. from the mined area in all directions. Ground water standards are only applied at the boundary of the ground water management zone or beyond. No standards apply within the ground water management zone. This means that any contamination must migrate 300 ft. from the mine or the mine property boundary before any standards would be applied, meaning that any ground water pollution will be well established by the time it is subject to regulation.

Once the mine has achieved bond release, the permit area of the mine becomes designated as limited class ground water (327 IAC 2-11-4(d) (1)). The standards for this area become the existing levels of contamination within the mined area at the time of bond release. This rule runs completely counter to the requirements and intent of SMCRA. Instead of setting standards and requirements to prevent the contamination, the state allows existing levels of contamination to lower the bar and water quality.

Federal and state mining law require that mined land be reclaimed to original or better uses. 30 U.S.C.A. § 1265; Ind. Code § 14-34-10-2. However, the adopted ground water rule will automatically designate all ground water in mined areas damaged by the mining activities. Under this Rule, no mine can return an area to original or better uses if those uses relied on ground water, in violation of the federal and state SMCRA requirements.

Under SMCRA, all mining operations must also "minimize the disturbance to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation." 30 U.S.C.A. § 1265(b) (10); Ind. Code § 14-34-10-2 (13). Indiana's rule eliminates any incentives to minimize impacts to ground water quality because the area will be designated as limited upon bond release. Furthermore, Section 4 of the Rule contemplates that the limited classification may apply to an undefined zone of influence around a coal mine area, outside the 300 ft. limit.

The Indiana Department of Natural Resources has stated that the limited use designation will not change the requirements for reclamation, but Section 4 of the Rule clearly states that the limited use designation will have an impact on Ind. Code § 14-34-4-7, coal mine permit or approval. Section 7 states what is expected of the mine operator in terms of protecting ground water in order for the permit to be approved. The fact that this section of mining law is affected by the limited use designation would seem to indicate that a lesser expectation of ground water protection would result. It is reasonable to expect some impact upon ground water within the mined area, but this rule would make mined areas permanent sacrifice zones in regards to ground water.

Indiana is not the only state that seems to remove mines from any accountability to ground water standards. The Illinois ground water rule (35 IAC 620) is similar to the Indiana rule. No ground water quality standards apply for inorganic constituents and pH within the area covered by the cumulative hydrologic impact area while the mine is in operation (35 IAC 620.450). Once bond release occurs, the ground water for mined areas is classified as "other groundwater". The standard for this classification is the existing level of contaminants present in the mine area. This classification is also extended to coal mine refuse disposal areas not contained within an area from which overburden has been removed, a coal combustion waste disposal area at a surface coal mine, or an impoundment that contains sludge, slurry, or precipitated process material at a coal preparation plant (35 IAC 620.240).

It would be unrealistic to assume ground water in mined areas will remain in pristine condition. There should be a qualitative, numeric standard in place that establishes a clear line when an unacceptable amount of contamination occurs. SMCRA only creates a narrative standard and gives no real clarification on this issue. Without any real measure of when mines violate the ground water protection provisions of SMCRA, there is no accountability toward protecting the water of coalfield communities. When the drinking water of coalfield communities is at stake, the decision of when action needs to be taken should not be left to opinion. SMCRA needs to be amended to provide a clear, defined point where enforcement is needed.

In order to determine how to go about minimizing the damage to water resources within the mine area and preventing material damage outside the permit area, each mine is expected to complete a cumulative hydrological impact assessment (CHIA), which evaluates the probable impacts to the area's ground and surface water due to mining. The CHIA should examine site specific information in order to accomplish this task.

HEC reviewed five CHIAs prepared by the Indiana regulatory agency that covered mines in five separate counties across a large geographical area. In all five, almost identical boiler plate language was used to describe the geologic conditions, the geochemistry of sites and effects on groundwater after mining. None contained the detailed site-specific analysis required before a responsible determination can be made of the possible impacts on the ground and surface water and how to best minimize these impacts. All five CHIAs assumed that the mine had a clay layer to prevent downward migration of water. Not one contained any analysis—much less acknowledgement—that water moves sideways and downgradient.

There is little if any aquifer specific information in Indiana's strip mining permits; The state does not require that different aquifers be sampled individually for quality, or that bale tests or pump tests be performed on aquifers individually to determine their permeability, rate of flow or connections with other aquifers. The state is not requiring that recharge rates be calculated for individual aquifers or cumulatively for all aquifers in the area to be mined. The state assumes that the direction of ground water flow is according to the structural contour of the layers of earth, or simply quotes the U.S. Geological Survey's estimate for general flow of ground water for the entire region. Indiana does not require that static water levels be mapped from individual aquifers to determine direction of flow. Without this aquifer specific information, a proper analysis of the possible impacts of the mining on nearby wells is not possible.

All five assessments also made the statement that the mine area had very little ground water regardless of the number of ground water users in the area. For exam-

ple, the CHIA for the Farmersburg mine, permit # S-287-1, made this declaration despite the presence of hundreds of households within 5 miles of the northern end of the mine that used ground water as their primary source of drinking water.

The CHIA was supposed to be a valuable tool in addressing site specific ground water concerns at each mine. Instead, these assessments have become boiler plate reports used to belittle ground water concerns rather than address them. Without numeric standards in place or adequate site characterization, the drinking water supply for numerous coalfield communities is not being adequately protected.

Citizen Participation

When SMCRA passed in 1977, it included ground breaking language on citizen participation. Citizens were given the right to actively participate in the permitting process, the right to file a Lands Unsuitable for Mining Petition (LUMP), the ability to hold agencies accountable when the law is not properly enforced, and the ability to recover legal costs when they are forced to take legal action to ensure proper enforcement. Citizens were given tools including pre-blast surveys in order to protect their homes from blasting damage. The rights granted to citizens are one of the most important parts of SMCRA.

These rights are not being upheld by the state agencies. I spoke with a number of Illinois residents while doing research for this testimony. They have all encountered stonewalling, refusal to accept citizen petitions, refusal to hold a public hearing, and long delays in the administrative appeals process that can last for years by the Illinois DNR. The citizens of Indiana have encountered similar tactics from the Indiana DNR. In fact, lack of good public participation was the most consistent complaint I have heard from Illinois residents.

For example, at the closed Monterey Mine 2, ExxonMobil refused to place an impermeable cap over their 30 million cubic yard coal waste pile, claiming the pile wasn't contaminating the groundwater off-site even though high levels of arsenic were being detected in nearby drinking water wells. In 2002, Illinois DNR ignored the request for a Public Hearing about the high hazard dams that contain the waste. In 2003, The DNR granted a public hearing on the reclamation plan, but refused to answer any of the public's questions on the plan.

In 2003, the reclamation plan was approved despite the fact that the mining company did not tell where the monitoring wells on the site were located. Illinois DNR itself admitted in its own evaluation that this made it impossible to determine whether any possible contamination was migrating off site. Without this data, there is no way to address whether the reclamation plan adequately addressed possible ground water contamination at the site. The reclamation plan has been under appeal for over 4 years. The appeal is now at the federal level. Meanwhile, the first off-site sampling of the groundwater by the mine was performed in 2006 and showed contamination.

In August 2005, Illinois DNR found that the pipeline the mining company had been operating to pump diluted contaminated groundwater into the Kaskaskia River was an on-going regulated activity. As a result, the public had a right to a public hearing on the pipeline. Illinois DNR had agreed to hold a hearing, but backed down when ExxonMobil filed extensive legal briefs arguing against the need for a hearing and designation of the pipeline as regulated under mining law. DNR sent the legal arguments to the OSM for review, who found that the mine arguments were not valid. In December 2006, Illinois DNR nevertheless changed their position in favor of the mine. The appeal of that decision is still underway.

In a recent case in Indiana, citizens appealed the issuance of the mining permit for Vigo Coal Company's Chili Pepper Mine. The appeal was based on the fact that the mine permit application did not have all necessary documents required for approval of the permit. Indiana regulations (312 IAC 25-4-23) clearly require that the mine list the permit numbers or permit application numbers for other necessary permits. Even though the language of the regulation is clear and unambiguous, the Indiana Natural Resources Commission ruled in favor of the Indiana DNR on the grounds that the Commission always defers to agency interpretation of the regulations. The Natural Resources Commission is supposed to be the rulemaking body over the Indiana DNR, and is the final step in the administrative appeal process. Yet, they admitted in the public hearing on this appeal that they will always defer to agency opinion.

The citizens filing the appeal did not have the resources to appeal the case to the state's courts so the precedent is established that agency interpretation of regulations will be a deciding factor in appeal cases. This has the effect of making any citizen appeal of a DNR decision a lost cause from the state unless they have the resources available to pursue the multi-year appeal process through the state and possibly federal courts. In short, the appeal process in Indiana is broken.

For the sake of brevity, I have only included two examples of how the permit appeal process has been skewed against citizens. More can be provided to the committee upon request. Coalfield residents wishing to appeal a permit must fight the uphill battle of convincing the agency's own judges to rule that their agency has acted in error. Before they can reach any truly independent court, they must spend a large amount of time and money going through the administrative process. This system does not provide true oversight.

Power Plant Waste Disposal

Coal mines across the country are increasingly used as dump sites for coal power plant wastes (PPW). The disposal of millions of tons of PPW raises unique problems and issues that are very different from those created by mining. SMCRA is simply not written with the intent of ever regulating such disposal operations. State regulations and policies on mine disposal of these wastes consistently fail to enact the most basic environmental safeguards needed to adequately protect human health and the environment. Disposal practices that would be forbidden under solid waste laws for the same wastes are approved in mines.

The National Research Council (NRC) did a thorough study of the placement of PPW in mines throughout the country, "Managing Coal Combustion Residues in Mines" (2006). The study found that "enforceable federal standards are needed for the disposal of [coal combustion residues] in minefills to ensure that states have specific authority and that states implement adequate safeguards." The report found major deficiencies in existing state regulations on mine placement including inadequate waste and site characterization and the lack of enforceable performance standards.

The focus of SMCRA and the regulatory agencies in regards to protecting water quality is preventing acid mine drainage, which results from the oxidization of sulfur and iron deposits in the mine overburden. PPW, on the other hand, presents completely different kinds of concerns and thus requires very different solutions. The major concern with PPW is that wastes have the potential to produce toxic levels of a number of different pollutants when they come into contact with water.

The NRC's report found that "high contaminant levels in many [coal combustion residues] leachates may create human health and ecological concerns at or near some mine sites over the long term." PPW contains concentrated levels of different pollutants including arsenic, cadmium, lead, selenium, boron, and sulfates. Dozens of scientific studies have found that contamination from PPW can cause deformities, reproductive problems, and death in mammals, fish, and reptiles. Despite all the available evidence of contamination problems from PPW, most state mining agencies refuse to admit that any threat is posed to ground and surface water quality by these wastes.

The OSM has announced that it will be conducting a rulemaking on the placement of PPW in mines. We are thankful to OSM for starting the process of developing these regulations, but we have serious concerns whether the OSM will develop regulations that offer a sufficient level of protection to citizens beyond the status quo. For many years, OSM and state agencies have vehemently opposed citizen requests to enact regulations similar to the recommendations made in the NRC report. In order to ensure that the proposed federal regulations adequately protect human health and the environment, HEC believes the following elements must be included into the rule:

The proposed rule must include the basic requirements of the Resource Conservation and Recovery Act (RCRA). The disposal of large quantities of PPW raises unique problems and issues that are very different from those created by mining. The proposed rule must include the basic safeguards laid out in the federal waste rule, the Resource Conservation and Recovery Act (RCRA), such as separation of the wastes from ground water, long-term ground water monitoring, and corrective action standards in order to ensure that these disposal operations are managed properly. Incorporation of RCRA into the rule will also ensure that citizens will receive a consistent level of protection for their health, water, and environment regardless of what kind of disposal facility they live next to.

The current system of some disposal sites being regulated under RCRA and some under SMCRA has resulted in a double-standard for citizens living next to mine disposal sites in violation to their right of equal protection under the law. Coalfield citizens have been exposed to disposal practices at mines that would be in violation of RCRA such as open dumping into direct contact with groundwater. We therefore ask that OSM choose its recommended options of either a joint SMCRA and RCRA rule on mine disposal or a RCRA Subtitle D rule that is enforceable through SMCRA permits. These options are necessary to ensure a rule that provides adequate and equal protection to coalfield citizens.

The regulations should include at a minimum the basic environmental safeguards recommended by the National Research Council study. These safeguards include waste characterization, site characterization, monitoring, standards for clean ups, and public input requirements. The study also recommends that contact between the wastes and water be minimized. We believe this would be best achieved by a requirement to prohibit disposal of the wastes below the pre-mining ground water table. These requirements should be enforced regardless of whether the PPW is being dumped or used for "reclamation" in active or abandoned mines.

OSM should adhere to the Federal Advisory Committee Act (FACA) process in order to ensure that all stakeholders are brought to the table for an open discussion of the proposed rule. Coalfield residents and citizens groups have been underrepresented at numerous OSM forums on the issue of mine placement of PPW. These stakeholder groups deserve adequate representation in discussions of the proposed rule. We ask that regional public hearings be held on the proposed rule to ensure citizens have adequate opportunity to voice their concerns.

Longwall Mining

In Illinois and Ohio, homeowners and farmers are very concerned about the increased use of longwall mining. Unlike traditional room and pillar mining, longwall mining removes the entire coal seam in thousand foot long panels beneath an area that can extend for tens of thousands of acres. The mines are allowed to subside, which can cause the surface to sink as much as four to five feet. Illinois DNR has claimed that it has no authority over longwall mines even though SMCRA regulates the surface impacts of underground mining (30 USC 1266).

The subsidence from longwall mining has caused a number of serious problems in Pennsylvania. Houses have suffered severe damage including being pulled off their foundation, fallen chimneys, broken window and door frames, and broken water and gas pipes. Longwall mining can also have a serious effect on ground and surface water. The subsidence can cracks to form in aquifers, which leads to dried up wells and springs. On the surface, it can alter the flow of streams, turning the waterways into isolated pools.

The major concern for residents of Montgomery County Illinois will be the impact on farmland. Many of the farms in the area are centennial farms that have been owned by families for generations. In Pennsylvania, longwall mining has altered drainage patterns and rendered farmlands too wet to be farmed. Over 27,000 acres of the farmland in this county is in bottomlands and subsidence of four feet would most likely disrupt drainage ways, and lead to more flooding of the farms. Subsidence from longwall mining has also opened up cracks and deep fissures in crop and pasture land that pose serious hazards to livestock and farm equipment.

The Illinois DNR has repeatedly refused to address citizen concerns about possible damage to their homes and farms on the grounds that SMCRA does not give them the authority to regulate underground mines. Citizens in Montgomery County have filed a petition to designate the area as lands unsuitable for mining. The Illinois DNR has denied the permit repeatedly on the grounds that it cannot accept such petitions for underground mines, but this would appear to directly contradict their own regulations, which declare the "An area shall be designated as unsuitable for all or certain types of mining operations." (225 ILCS 720/7.02)

The Illinois DNR seems to be completely unwilling to take any sort of regulatory action in regards to longwall mining. This situation leaves citizens with no recourse for protecting their homes and their property from possible damage from longwall mines. Coalfield residents in Pennsylvania have also experienced the same resistance from their state agency. Congress must take action to protect the property rights and environment of citizens potentially impact by these mines. Currently, mines are given a green light to damage peoples' property.

Conclusion

While SMCRA is at its core a good law, the language needs to be strengthened in many places in order to adequately protect coalfield communities and their environment. The need for coal is not going away anytime soon, but that need must not grant companies a license to damage homes, quality of life, and drinking water.

We ask that you please consider taking the following steps to give SMCRA the muscles and teeth it needs to adequately protect coalfield communities and their environment:

- Define what it means to minimize disturbances and prevent damage to the hydrologic balance
- Create better oversight of the state agencies

- Require national regulations on mine disposal that at a minimum incorporate the recommendations of the National Research Council's report Managing Coal Combustion Residues in Mines
- Adopt requirements to minimize surface impacts from longwall mining

Thank you for the opportunity to testify on this important law.

The CHAIRMAN. Ms. Pfister.

STATEMENT OF ELLEN PFISTER, ON BEHALF OF THE NORTHERN PLAINS RESOURCE COUNCIL AND THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, SHEPHERD, MONTANA

Ms. PFISTER. Mr. Chairman, members of the Committee, thank you for the opportunity to testify today on the 30th anniversary of this landmark legislation.

I am Ellen Pfister, a rancher from the Bull Mountains North of Shepherd, Montana. Unlike most, if not all, of you here today, I own property that is the subject of an ongoing coal permit.

I first testified before this committee in September 1972 in support of Representative Kenneth Heckler's bill for a temporary ban on strip mining. At that time, strip mining was proposed for the north end of our ranch. Like many others who were involved in the passage of SMCRA, I was naive enough to believe that the law would be enforced, and that I could go on about my life.

From 1988 through 2007, I have been involved with the permitting process for a speculative longwall mine that will undermine part of my property. Right now it is shut down for lack of money, but, like cancer, it has not gone away yet.

SMCRA is a good law as far as it goes. It has resulted in the regarding of a great many spoils areas and revegetation of those areas, with varying degrees of success.

But the three biggest failures in SMCRA are the failure to include the reclamation of surface effects of longwall mining beyond the mine adit areas, the failure to anticipate the expansion of mountaintop removal, and the failure to reclaim underground water resources by minimizing damage to them. The first two are omissions from the law, and the third is a failure to adequately enforce the law.

In the West we don't have mountaintop removal, but we have aquifer removal, because surface mining in the West is mining the aquifer. The damage mountaintop removal does is spectacular, like beheading a person. Longwall and aquifer mining are like dying of pancreatic cancer. One death is much more spectacular and visual, but one is just as dead from cancer.

The failure to protect our water resources is connected to overall reclamation rates in the West that are abysmal. OSMRE data shows only about 6 percent as much acreage reclaimed as mined in the West over the last 10 years.

Western Organization of Resource Councils and the Natural Resource Defense Council will be releasing a report next Friday, the 30th anniversary of the Act, with this and other findings about the status of reclamation and enforcement under the Act in the West. We will provide copies of this report to the Committee, and ask that it be made part of the record.

One of the reasons for this low level of bond release is the way the permit plans have been approved. Decker and Spring Creek Mines in Montana were allowed to mine for years before regrading any appreciable acreages, let alone beginning revegetation. We believe the permits which allowed that were granted in violation of SMCRA's standard that reclamation be as contemporaneous as possible. Twenty years does not meet that standard. The State of Montana should not have allowed it, and OSMRE should have held the state responsible.

This situation presents a good opportunity for further oversight by Congress. There is another phrase that has no definition after 30 years of the law.

Additional reasons for low levels of final bond release detailed in my written statement are the attitudes of company managers, which are reflected in the revegetation on the ground, and do very significantly. The use of rolling bonds and the failure to reclaim the water resource, which is required before final bond release, water replacement in Montana is euphemistically termed opportunistic. This means no positive action is taken to prevent the destruction of aquifers, and no plan exists to replace or protect the damaged water.

Mining companies are allowed simply to keep their eyes open for opportunities to replace destroyed wells and springs as they mine along. However, they do seem to overlook opportunities.

I do not believe there is anything especially wrong with SMCRA, with the exception of not covering longwall mining and mountaintop removal. But I do believe that as an agency, OSMRE has long been lacking the intent and resources to enforce SMCRA as it should be enforced.

The inspectors are the face of OSMRE and the states to protect the citizens from the effects of coal mining. SMCRA was well drawn, with two enforcement agencies, state and Federal, because it is all too easy to co-opt one or the other. It is a little harder to co-opt both, although I am now beginning to wonder.

Essentially, OSMRE inspection personnel are constables on patrol, and if a state has primacy, their inspectors have the same mandate.

In closing, Congress could pass more laws and see them twisted or ignored. It is better to seek enforcement of the law you have. When the agency charged with enforcing laws you have passed attempts to withdraw from enforcement and hide from the public, who believed in the law you have passed, the agency causes the public, both industry and citizens, to hold the law in contempt.

Mr. Chairman and members of the Committee, you should be angry that SMCRA is being administered in this fashion. We appreciate your action in holding this hearing, but you need to do closer oversight on OSMRE, in Washington and in the field, to hold OSMRE accountable for its enforcement of the Act, and for adopting regulations and policies consistent with the intent of Congress, and for ensuring that state agencies do likewise.

We urge you to use your oversight authority to impress upon OSMRE the importance of improving reclamation, with a special attention to reclamation of water resource within the mine permitted areas. Whether the issue is acid mine drainage, the impacts

of mountaintop removal and longwall mining, and the routine aquifer removal we see in western strip mines.

We also suggest that you demand improved reporting from OSMRE, and urge you to support more funds to OSMRE and state agencies. The agencies can do a much better job with the amount of money they have, but it is also clear that lack of funds and personnel is part of the problem.

I am submitting some pictures showing some of the coal mine sites I have visited over the years, as well as a copy of a document from the Western Interstate Coal Board, called an impending crisis for coal supplies, which deals with funding to the coal programs of the western states.

Mr. Chairman, before I close I would like to thank you for your leadership on the 1872 Mining Law Reform, as well. Western Organization of Resource Councils and Northern Plains also strongly support your legislation that is being heard tomorrow.

Thank you.

[NOTE: The pictures contained on a CD have been retained in the Committee's official files.]

[The prepared statement of Ms. Pfister follows:]

Statement of Ellen Pfister, Shepherd, Montana, on behalf of the Northern Plains Resource Council

I am Ellen Pfister, a rancher from the Bull Mountains North of Shepherd, Montana. I own property that is the subject of an ongoing coal mining permit. I am testifying today for the Northern Plains Resource Council and the Western Organization of Resource Councils. Northern Plains is a grassroots conservation and family agriculture group that organizes Montana citizens to protect our water quality, family farms and ranches, and unique quality of life. WORC is a regional network of seven grassroots community organizations, including Northern Plains, which have 9,500 members and 45 local chapters in seven states, including the coal-mining states of Montana, Wyoming, Colorado, and North Dakota.

In the early 1970s, huge energy corporations threatened the homes and livelihoods of ranch families near Colstrip and in the Bull Mountains. Those families and other Montanans formed Northern Plains in 1972. Northern Plains' early efforts led to passage of a state strip mine law, and Northern Plains was also a national leader in securing passage of the historic federal strip mine law in 1977.

I first testified before this committee in September 1972 in support of Representative Kenneth Heckler's bill for a temporary ban on strip mining. Little did I know that I was about to get involved with a sideline project that would occupy the rest of my life. At that time, strip mining was proposed for the north end of our ranch. There were no safeguards for the surface property owner at all. On the third attempt at passage, the Surface Mining Control and Reclamation Act of l977 was passed by Congress and signed by President Carter.

30 Years of SMCRA

SMCRA is a good law as far as it goes. It has resulted in the regrading of a great many spoils areas and revegetation of those areas with varying degrees of success. There has been little success in reforesting areas which were previously hardwood forests. Most of the mountaintop removal areas are denuded of trees. The western prairies have vegetation ranging all the way from weed patches to some pretty good looking mixed grasslands. The spoils are being regraded to approximate original contour to a greater or lesser extent.

The three biggest failures in SMCRA are the failure to include the reclamation of the surface effects of longwall mining beyond the mine adit areas, the failure to anticipate the expansion of mountaintop removal and the failure to reclaim underground water resources. The first two are omissions from the law, and the third is a failure to adequately enforce the law.

Underground coal mining, whether room and pillar or longwall or any other kind of underground extraction, should be included within the purview of SMCRA. When the strippable coal is gone the coal industry will turn to other methods for coal recovery. The surface damages and damage to water will not abate with a change in

the method of mining. These surface impacts of underground mining should be clearly included.

When it passed SMCRA, Congress did not foresee the damages that large scale longwall mining can do or the potential for explosion in size of mountaintop removal. In the West, surface mining removes the underground water aquifer—the coal seam. All of these mining methods are extremely damaging to water regimes. All of these damage the surface, but in different ways. Mountaintop removal is like beheading a person, and longwall mining and surface mining are like dying of liver or pancreatic cancer. Beheading is much more spectacular and visual, but one is just as dead from cancer.

OSM has permitted the States to approve permits that I believe violate mandates within SMCRA itself, such as the standard for reclamation to follow behind mining as contemporaneously as possible. Permits that allow a mine to wait 20 years before beginning regrading and other reclamation procedures certainly have no element of contemporaneous reclamation. SMCRA is bent to the mine operator's complete convenience. Certain pits that are left open for years on the chance that the mine may need that coal to blend fall short of contemporaneous reclamation as well.

The practice seems to be that the terms of permits will be enforced even if the permit does not comply with SMCRA, as long as the permit is complete by dealing with every section of the state regulations. Granting the permit gives an easy out on enforcement of the standards of SMCRA to the permittee and the agencies.

As a subject and participant in the permitting process in Montana, I have come to the conclusion that it can be summed up as "Promise her anything, but give her Arpege"...or maybe, dime store perfume. Any remediation in the permit can be relaxed or voided if the permittee cries economic hardship. As someone who will suffer economic harm if remediation measures are not enforced and successfully implemented, I really do not know what the final remediation will look like. I suspect the permittee's economic hardship will trump my economic hardship. The permit is supposed to be a promise of reclamation and repair by the State to its citizens, because the State approved the reclamation plan and accepted the promise from the permittee. I have grave doubts as to how binding that promise is on the permittee.

Speculative Mine Permitting

From my personal experience, application of SMCRA's mine permitting procedures by state and federal agencies does not deter application for permits by speculative ventures. I hope that what I have dealt with for the last 18 years is not common nationwide.

Like many others who fought for passage of SMCRA, I was naïve enough to believe the law would be enforced, and that I could go about my life. Coal entered my life again at Christmas l988, when two boys from Pikeville, Kentucky, came around wanting to start a coal mine that would affect the north end of our place. Then a bigger fish, Burlington Resources, came around with the idea of a longwall mine and a proposal to trade Federal coal for some of their land. It would be a large block of coal and would support a 3 million ton a year mine. I knew Burlington Resources would never mine a lump of coal on their own. Their ambition was to be gentlemen royalty collectors, but the permitting process began, and regardless of how speculative a mine plan is, a landowner or party adjacent to a mine cannot afford to ignore it. The permitting process grinds on regardless of the economic feasibility of a project. This speculative mine has occupied my time and the Montana Coal Program's time for 18 years with no sign of economic success for the mine.

Burlington Resources put the permit on the market as soon as it was issued in l992 and finally found a buyer in John Bauges, Jr. of Tennessee in l995. He began mining then, but in l998, the permit was permanently revoked for mining with a pattern of violations, and the bond forfeited. Two years later the state of Montana had barely begun to clean up Baugues' mess, when John Baugues showed up again, striking a deal with the State of Montana to reduce his fines by about two-thirds and requesting that the State of Montana resurrect the permanently revoked permit. OSMRE was brought in to rule on whether a permanently revoked permit could be resurrected. OSMRE ruled that there was one precedent for doing so from West Virginia; however, no permit number or mine name or location was ever cited. No one that I met from West Virginia had ever heard of it. OSMRE enabled the resurrection of a mine that is a pure speculation.

Once the permit was resurrected in 2000, Baugues et al came back with a bigger and better plan to mine 12 million tons a year, which would take out the whole coal reserve in our area in 30 years and leave the entire heart of the Bull Mountain recharge area with deeply damaged water. In addition to the mine, the Baugues consortium proposed a 700 MW merchant power plant, which has now morphed into a 300 MW power plant and a 22,000 barrel a day coal to liquid fuels plant, which

in turn needs an additional 150 million tons of strippable coal to be even remotely feasible.

The Bull Mountain Mine shut down again in March 2007, as it was being sued in foreclosure by bond holders, North Carolina and Florida churches and retirees, who were promised 11% return on their investment bonds. While Baugues et al were defaulting on their bonds, they were running around our country trying to buy ranches, some of which they lost their earnest money on, not being able to make the final payment.

In January 2007, Montana DEQ finally approved the permit amendment to the Bull Mountain Mine, which takes in the north end of our place. They claim our high springs will not be damaged. Our springs are in the vicinity of 500 feet above the coal. Aside from the property owned by the coal company, our ranch will be the second property to be damaged when the second longwall panel begins operation. I am not optimistic about the future of our water; "no damage" does not jibe with what I have seen in other areas of the country. The primary authority relied upon by the state is a consultant paid by the permittee in l992, who cited no specific instances in western longwall mining similar to the geologic conditions in the Bull Mountains in finding that there would be little or no damage to our water.

Since the mine was first permitted in l992, it has never operated on the schedule shown on the permit. They are months and years behind schedule. The mine would eventually take out a subdivision in the Bull Mountains, if it proceeds as planned. Those homeowners are hoping the threat will go away, and don't want to face the problem of what and when will something happen to their property. The town of Roundup no longer holds its breath with anticipation when the mine makes an announcement promising jobs and economic development, and payment terms in Roundup are cash only for the mine. The permit is the only thing that holds this speculation together.

Longwall Mining

Most of the longwall mines in the West are under public lands; the people are gone. The effects are hidden underground, known only to the regulators and the mining companies. Since the U.S. Bureau of Mines was closed in 1996, there have been and still are no studies being done on the effects of longwall mining. The only studies I could find were scientists putting their sensors down well holes in the east, and bewailing the fact that after the longwall machine passed, they couldn't get anymore readings on where the water went. They had no money to pursue the information, and probably no way to access legally the land that was mined. That is a failure in SMCRA. The entire area in an underground permit should be included in SMCRA, because the affects of longwall coal removal go to the surface miles away from the adits and processing plants. Unless there is jurisdiction through government action, there is no way for follow-up studies to be done of water damage in longwall mine areas, and no one with the resources to find the lost water.

Since l989 when longwall mining came to the Bull Mountains, I have tried to find out what has happened in longwall areas across the country. The water buffalo—a plastic above-ground cistern, usually set on the road in front of a house, which mining companies use to deliver replacement water to homes and farms—is the indicator species for the health of water in longwall areas. Where has the original water gone that was once in wells and springs? No one seems to know, and landowners are powerless to force a search. I cannot think that water stored for home use in water buffaloes is healthy for families.

I met a dairyman in Western Pennsylvania whose farm dated back to l795 who was ultimately forced out of dairying because the water hauled to his cows was chlorinated, and they could not thrive on it. I have been visiting by e-mail with a farmer, Floyd Simpson, in Southeastern Ohio whose land lies about 500 feet over the coal seam being longwalled, who lost springs going back to the late 1700's, and old wells. It took about three weeks for the water to fail after undermining. The coal company has been very slow to deal with the promises it made him prior to undermining. He has had trouble with water haulers after undermining, and his historic farm buildings were severely damaged. He has a website, www.countrymilefarm.com, with a diary of the damage that occurred when he was undermined in late 2003. He does not know where his water went. He knows he does not have the water he had.

Southwestern Pennsylvania has been devastated by longwall mining; it is a land of leaning chimneys, damaged homes, and water buffaloes. Interstate highways as well as county roads have been undermined. I have seen half a county road slipped 40 feet down the hill from where it had been, thanks to subsidence.

Acid Mine Drainage

Permits that allow acid mine drainage are still being issued. I do not find that a failure in the law, but in the administration of the law. Acid mine drainage from Eastern mines seems to be the norm. Save Our Cumberland Mountains fought for 10 years to get Fall Creek Falls State Park in Tennessee declared unfit for mining due to the certainty that mining in that watershed would cause acid mine drainage over the falls. I doubt if many permits have been denied on the grounds that mining would cause acid mine drainage. Although SMCRA allows the designation of areas unsuitable for mining, very few areas have that designation, and it is difficult to get.

Save Our Cumberland Mountains did a study in l989 on acid mine drainage on reclaimed sites in Tennessee and found a lot of it, despite the promise we saw in SMCRA to end it. I have watched over the years as OSMRE tried different things to mitigate the improvidently granted mine permits that were discharging acid mine drainage. There was the Appalachian Clean Streams Initiative that tried to dip into USDA funds to help out, as well as waylay any other money that could be found. There was AMD and ART, which was an attempt to show how acid mine drainage treatment areas could be turned into a community enhancement. That, too, used funds other than funds from the party who caused the damage in the first place. OSMRE has not had the guts to face down the companies to make them internalize the costs of their actions, and fix the damage that is occurring on permitted mine sites.

Since the passage of SMCRA in l977 the size of Eastern mines, particularly longwall and mountaintop removal, is increasing and beginning to approach the size of some Western mines. The Eighty-four longwall mine at Washington PA was permitted to undermine 22,000 suburban acres initially. The mountaintop removal mines are up to 5,000 acres and above. The mountaintop removal mines are depopulating the towns and settlements that are unlucky enough to reside below them.

The Western mines depopulate areas as well. The practice has been to buy out the rancher and give them an option to buy back at some time in the future. If the mine is on public lands, the public is excluded from the mining area. Both East and West are depopulating coal bearing areas. If one becomes a tenant of the company when he had previously been a landowner, he is no longer independent or in a position to speak his own mind. The company regards the permit as being between the company and the agency and no one else should have anything to say. If the people are gone, there is no one to see or to tell how badly the mines reclaim the mined lands.

Water Damage

We don't have mountaintop removal in the West, but we have aquifer removal. The mining companies and regulatory agencies regard water in the western mines as fair game for damage and diminution. Water from disrupted aquifers comes into the pit, with no attempt to insulate the water from contact with the spoils materials. Experimental practices have been suggested from outside the agencies and industry, but those practices would take planning at the permit issuance stage. That has not been done in the past, and there are no plans to do it in the future. Some of the Western mines are dry in the pit, but others have quite a lot of water that pours into the pit. The flushing that does occur within the pit is unpredictable and uncontrolled. Now, to add insult to injury, OSMRE is considering a new regulation that would allow the dumping of fly ash in the strip pits in the East. I do not believe that Congress meant to allow the dumping of industrial wastes in surface mining pits when it passed SMCRA.

The Colstrip, Montana, electric generating plants offer a good preview of what can happen when fly ash is mixed with water. The fly ash pond at Colstrip was constructed in about 1974 to a depth of eighty feet, but only the top 40 feet were lined with impermeable material. Water began leaking from the bottom of the fly ash pond shortly after, contaminating the wells on the Kluver Ranch downstream. Thirty years later, the pollution has advanced downstream to contaminate the wells on the McRae Ranch. The ranch wells were drilled deeper to get below the pollution, but there is nothing to keep the pollution from eventually reaching the deeper water as well. The company has been pumping the surface water from the toe of the pond back into the pond, but the water keeps traveling underground. I do not think OSMRE has the will to enforce anything that might approach safe storage of fly ash underground in a wet mine, and I know the State of Montana does not.

Recently the Rosebud Mine at Colstrip cut into an area called Lee Coulee, which was a new mining area. They hit a tremendous vein of water which they pumped on down the coulee, ruining 90 acres of hay land. It drained the springs above the mine cut. They are no more. Don Bailey's hay ground is ruined, and the water is

gone. He had to sue the mine to recover his damages. The waste of water from Lee Coulee is an act of extravagance like lighting cigars with thousand dollar bills.

The Rosebud mine also had a twenty mile highwall open for a number of years—10 miles on the north side of the hill, and 10 miles on the south side of the hill, and the mine is moving in a direction which has the potential to create even longer highwalls. The mine was keeping the mine road at the base of the highwall open to have a loop road on which to haul coal.

The State of North Dakota issued a permit to turn Kenney and Gwen Thompson's farm land into a dump for an adjacent mine that was mining on the farm. The farm couple didn't know about it until diesel fuel turned up in the well at their house. OSMRE was no help to them. They eventually sold to the mine due to the farmer's ill health. Miners at the mine told the couple about all the hazardous waste the mine dumped in the mine pit on their land.

Now there is a lawsuit filed in Denver over dumping fly ash in the Navajo Mine in New Mexico and leaving it open, blowing ash in the wind. OSMRE is responsible for mining on Indian lands. OSMRE allows dumping fly ash in the mine pit, which is not clearly authorized by SMCRA. The mine operator is not even covering it in a prompt manner, which should be required even if SMCRA authorized dumping fly ash in a mine. I saw fly ash being dumped in that mine in a flyover in l992. There is a lot more fly ash there now.

When we were in the permitting stage of the initial Bull Mountain Mine, we were told by state agency personnel that water replacement would be "opportunistic". This means that the mine operator would develop sources of replacement water when they run across them, in the course of mining—as opposed to having a plan for replacing the water up-front, in the permit, before mining begins. A Colstrip area rancher watched one of the mines bury a spring that could have been developed with a little care—so much for opportunistic development.

The Jacobs Ranch Mine in Wyoming is finally putting in for bond release on the areas against the Rochelle Hills, which were mined about 1980 when the mine opened, because water is finally beginning to infiltrate into the mine areas from the undisturbed areas toward the hills, starting to re-establish the groundwater that was there before mining. As it advances west, the mine is also dewatering the coal in advance of its mining area to get the coalbed methane out before it removes the coal. The combination of surface mining and coalbed methane development may result in an area devoid of any water for a very long time.

Water loss in the East is typically dealt with by either a water buffalo or connecting people to a pipeline from somewhere else. I have always wondered what will happen when that "somewhere else" is also damaged by coal mining, and that water disappears as well.

The Citizen: Regulation and the Law: State and Federal

To the ordinary person, of the 4 sets of documents that can govern coal mine reclamation, SMCRA is the plainest to read and understand. The language is generally set in terms of "shall" and "will", which most people understand, whether they like it or not. Going back about the last 25 years at least, OSM has been in the business of putting out regulations to bend "shall" and "will" into something else, if possible. I don't know of any proposals to strengthen SMCRA regulations during that time.

Neither the states nor OSMRE have any programs to educate citizens about their rights under SMCRA, the law's citizen enforcement provisions, or the standards of reclamation established by SMCRA on other than an ad hoc basis. There is no easy reading document for citizens. The text of SMCRA itself is the plainest of the materials available.

The federal regulations are long and a lawyer's joy. When the state laws and regulations are added on top of that, which is the case when a state has primacy, the amount of material to digest becomes nearly overwhelming. Montana's education for citizens about what the law says was to give them a copy of the state regulations, but even that seems to have gone by the wayside in recent years.

The Montana law has gone from a law which said "shall" and "will" to one which says "may" and "should" to favor the newly fashionable tenses in legal writing. "Shall" and "will" are clearly defined in court cases and English classes. The Department of Environmental Quality, acting at the direction of the Montana legislature, is attempting to conceal the mandatory effect of SMCRA, and OSMRE has gone right along with this, although SMCRA requires state programs to be no less effective than the federal program. Essentially, OSMRE inspection personnel should act as constables on patrol, and if a State has primacy their inspectors have the same mandate. Montana is trying to obscure that mandate and to remove the sense of immediacy of enforcement under the law changes of 2003 and 2005. OSMRE tried to obscure the sense of immediacy with its Reg. 8.

Reg 8, in its latest, 1999 incarnation, is an internal OSMRE directive that has functionally eroded the independence and ability of the agency's field staff in overseeing state programs. Much like "Catch-22", Reg 8 effectively allows state agencies a veto over what part of their programs can be evaluated and corrected by OSMRE, and prohibits evaluation of off-site impacts by OSMRE if the state program doesn't define them as off-site impacts.

It takes years for OSMRE to approve or disapprove changes to Montana's law and regulations. In the meantime, the Montana agency enforces changes made by the legislature to the law and its own changes to implementing regulations, regardless of whether they comply with SMCRA or have been approved by OSMRE. I wonder what happens when Montana approves actions under its law while waiting for OSMRE to rule, and later it is found that the approved action was not in compliance with SMCRA.

OSMRE's budget for "environmental protection," which includes funding for state program evaluation, fell by almost 18 percent, adjusted for inflation, between 1997 and 2005. The number of state program evaluation staff also fell. This may explain why OSMRE is so slow in processing regulatory packages. It takes so long, that if one has commented on a package, by the time the ruling comes out, one has almost forgotten about it. If the non-compliant action is ensconced in the permit, will Montana enforce that rather than an action which would comply with SMCRA?

Regulation and Money: State and Federal Relationship

OSMRE was a victim of the Clinton balanced budget drives. The first people cut were the inspectors, and the first of those to go were women and minorities. The cuts have not slowed down under subsequent administrations. It is no wonder that now, as its personnel ages and retirees, OSMRE is running into a shortfall of qualified people to move up.

The inspectors are the face of OSMRE and the states. They protect the citizens from the effects of coal mining. OSMRE has tried to withdraw itself from direct enforcement and contact with possible on the ground enforcement. SMCRA was well-drawn with two enforcement agencies, state and federal,

because it is all too easy to co-opt one or the other. It is a little harder to co-opt both, although I am now beginning to wonder. OSMRE has further tried to reduce its presence by refusing to consider offsite impacts from mining unless the states report the offsite damage in state statistics.

The Western Area Office of OSMRE is not even listed as tenant in the Denver office building in which it is located on the 33rd floor. Not only has OSMRE tried to withdraw from direct enforcement by way of Regulation 8, but apparently the Western District Office of OSMRE is trying to physically hide.

In passing SMCRA, Congress intended that the regulating agency keep a presence in the coalfields and that the permits be available for inspection in the coal fields. Montana is just barely in compliance with SMCRA on that point, with the Billings Office having only a generalist and a secretary. The generalist employee is also an inspector. All the other inspectors in Helena are also specialists in other fields, and every specialist is an inspector. The question is whether academic specialists also have the temperament to make the kinds of decisions that an inspector must make. Billings is about 90 miles from the closest big surface mine. The rest are hundreds of miles further. Helena is 250 miles from Billings. Inspecting from Helena will be difficult, and I think the amount of travel time will render the coal program less effective.

The Montana Coal Program has been losing employees, and the money to hire replacement employees has been declining, especially from Federal sources. The Federal Government was obligated to fund the Western States to the extent that the coal in the state belonged to the United States. The Western Interstate Energy Board says that the Federal Government is saving money with the states accepting primacy, because the state pay levels are so much lower. Yet the Federal Government still keeps cutting real dollars from OSMRE and state budgets.

Montana has been saving money by paying wages for people with advanced degrees that are significantly below what they could earn in industry. Either the people who chose to work for Montana are dedicated to something other than top dollar, or they are short on competence, or they have reached a certain age in industry where industry no longer wants to hire them. I do know that the State has been a revolving door for hydrologists of all types. They get a little experience from the State to show on their resume, and then move on. The Montana Coal Program has been defunded and short changed on personnel, and it is no wonder it is teetering on the brink of someone requesting a 731—asking OSMRE to take over a state program because of the state's failure to meet the requirements of SMCRA. The Montana legislature found $250,000 additional temporary funding this year, but now it

appears that only part of the money will be available to alleviate the employment problems at DEQ.

If there is not better funding forthcoming, it is possible that the United States will have to pick up the tab for regulating the damage that will come from its appetite for coal. Funding less today will cost you more tomorrow.

Bond Release

OSMRE data shows that 22,905 acres have been reclaimed and achieved final (Phase III) bond release in the West over the last ten years; meanwhile, 400,000 acres were disturbed by new mining. I think there are several reasons for this low level of bond release (about six percent as much acreage reclaimed as mined).

The first is the way the permit mine plans were approved by the agencies. Decker and Spring Creek in Montana were allowed to mine for years before treating any appreciable acreages for regrading, let alone revegetation. We believe the permits which allowed that were granted in violation of SMCRA's standard that reclamation be as contemporaneous as possible. Twenty years does not meet that standard. The State of Montana should not have allowed it, and OSMRE should have held the state responsible. This situation presents a good opportunity for further oversight by Congress.

The second reason is that some companies do not want to comply with the revegetation standards. Westmoreland has been head butting Montana over that for some years now. Westmoreland lobbied successfully for significant changes to revegetation and postmining land use standards in the 2003 Montana legislature—just as another mine in the state showed that it was possible to meet Montana's the previous, standard for revegetation. The difference was the attitude of company management. The mine which did a good job was a Rio Tinto mine, and its company managers had decided it was cheaper to comply with environmental laws than to constantly be hauled into court. The attitude of the managers was reflected in the quality of reclamation on the ground.

Revegetation is possible in most of the northern high plains, given the right company attitudes, but water resource reclamation is much more problematic, and is the third reason why final bond release is low. Water resource reclamation has had the lowest priority in the permitting and reclamation process. There are promises in the permits to replace individual water resources, but it is unclear whether and how those promises have been kept. Replacing individual resources depends on having a resource that can be found and depended upon to be potable, at the very least. I don't know how the states are going to meet the standard of not degrading and diminishing the water resource in the mine area. The practice today—leaving up to time and fate to clean up water quality and quantity—is not satisfactory to those of us who live in the coal fields. There is no research in the area, and the regulators are accepting time and fate instead of requiring specific actions to restore pre-mining hydrology.

Until the water is reclaimed, there should not be bond release. The States and OSMRE are coupled in ignoring this problem. If the States and OSMRE accept any more permits or permit amendments that ignore reclamation of the total water resource, a fine would be in order again.

Montana has been doing what is called rolling bond release, which is a fourth reason why final bond release is so low. In Montana, Stage IV bond release is the final stage indicating that the water resource has been reclaimed, and the state retains a small amount of bond money until Stage IV release. 9/11 raised the costs of bonds across many industries, including coal. The Stage IV bond money is now mounting up, and there are fears that if large amounts of acreage are suddenly up for bond release, there will be great pressure on the state to release, regardless of quality of reclamation, because if something should cause a bond forfeiture, there would not be enough money left to fix the problem.

Self bonding is allowed in some states. The State of Colorado allowed the Mid-Continent Mine to self bond with a limestone plant as collateral. The sole market for the limestone plant was Mid-Continent mine. Korea cancelled its marketing agreement with Mid-Continent. The mine closed. The bond was forfeited, the limestone plant now a worthless property that had lost its market. Meanwhile, the family that owned Mid-Continent had invested in Colorado mountain real estate. OSMRE had the authority to pursue that money, but did not with any vigor. The taxpayers have picked up the tab for what reclamation has been done on the Forest Service land where Mid-Continent operated.

Citizen Action

Citizens can file complaints in writing under SMCRA, but there are informal ways to make one's voice heard. The regulators see industry people on a regular basis.

They develop a familiarity with each other. They drink beer together in the hotel bar, if they are at an away meeting. If there is a regulatory office in a reasonably convenient location, citizens should stop by when they don't have a complaint. If there is a basis of familiarity, perhaps relations would be a little better. Such visits also help inform the citizens about conditions within their regulatory agency.

In Montana, it would be helpful if more of the state regulatory agency were closer to the mines. Because of the travel distances involved, most of the contact between the Montana state agency and citizens near the Eastern Montana mines consists of more formal meetings, and because of the turnover of regulatory personnel in sensitive areas, frequently the sacrificial agency lamb at such meetings is the newest and most inexperienced of Montana personnel.

The Casper Field Office of OSMRE, which regulates the highest producing coal area in the United States, has the most area to cover, and probably the fewest inspectors. Distance operates against a citizen getting a clear idea of how that office operates. It is 379 miles from Casper to Billings, 629 miles from Casper to Helena, and God knows how far to North Dakota. For quite a while last year, the Casper Office operated without a field office director. The Field Office Director from Albuquerque filled in. I would say that is hardly effective administration. Getting acquainted with the regulators will not solve all the problems relating to SMCRA enforcement, but it is a small step that citizens can take.

Conclusion: Congress' Responsibility for the Enforcement of SMCRA

Some of the agency actions are in effect, actions in contempt of Congress, as evidenced by Congress' intention expressed in SMCRA. I do not believe there is anything especially wrong with SMCRA, with the exception of not covering longwall mining and not coping with mountaintop removal, but I do believe that as an agency OSMRE has long been lacking intent to enforce SMCRA as it should be enforced. The agency has been a great hand to not want to take action on something unless it is immediately hazardous to human life. That is a judgment call, and the agency is not prescient. The process to pass SMCRA began with the disaster at Buffalo Creek, WVA. Fortunately, a similar tragedy for human life has not happened again, but how much luck was involved with the Kentucky River flood through Louisa, KY or the water break out at the AEP mine in Ohio? There are a number of sludge ponds throughout the East that are known by the agency to be unstable, but they remain unremediated, and the locations are not known to the public. Is OSMRE prescient as to which one will break first? Where are the states and OSMRE on this? Both are negligent and trying to hide out from that unpleasant policeman's task.

Congress could pass more laws and see them twisted and ignored. It is better to seek enforcement of the law you have. When the agency charged with enforcing laws you have passed attempts to withdraw from enforcement and hide from the public who believed in the law you have passed, the agency causes the public—both industry and citizens—to hold the law in contempt.

Mr. Chairman and members of the Committee, you should be angry that SMCRA is being administered in that fashion. We appreciate your action in holding this hearing, but you need to do closer oversight on OSMRE. We respectfully suggest you hold more such hearings both here and in the field, to hold OSMRE accountable for its enforcement of the Act, for adopting regulations and policies consistent with the intent of Congress, and for ensuring that state agencies do likewise.

We also suggest that you demand improved reporting from OSMRE. You also have the power to issue contempt citations, and I believe that you should seriously consider doing so. If you cannot get OSMRE to respect and enforce the law which it is paid to administer, then perhaps you should consider housecleaning in the agency.

We urge Congress to provide more funds to OSMRE and state agencies. The agencies can do a much better job with the amount of money they have, but it is also clear that lack of funds and personnel is part of the problem.

OSMRE and the states should require vastly improved reclamation at all phases, from regrading to water resource reclamation, revegetation, and final bond release. The percentage of mined acres reclaimed in the West is abysmal, and does not meet any definition of "contemporaneous reclamation," as the Act requires. A critical first step is for OSMRE to define contemporaneous reclamation, a job that has been pending for years now. OSMRE should also make clear in its regulations that mine permits will not be issued for areas in which a mine plan does not allow for and require contemporaneous reclamation, and consider increasing bond amounts to provide an adequate incentive for companies to apply for bond release, but also to do better reclamation in the first place. We urge you to use your oversight authority to impress upon OSMRE the importance of addressing these problems, with special

attention to reclamation of the water resource within mine-permitted areas—whether the issue is acid mine drainage, the impacts of mountaintop removal and long wall mining, or the routine aquifer removal we see in Western strip mines.

Finally, OSMRE should adopt a policy prohibiting the issuance of new mine permits or expansions in areas where stripmined land remains unreclaimed after more than ten years.

NOTE: A report entitled "An Impending Crisis for Coal Supplies: Demand Rises, Regulatory Grants Fall Short" prepared by the Western Interstate Energy Board dated November 30, 2006, is available at http://www.westgov.org/wieb/reclamation/2006/12-01finalrpt.pdf.

The CHAIRMAN. Before the Chair asks its first questions, it is going to ask a question of the audience that he asked earlier. Is anybody from OSM here? Did they reappear? Anybody representing OSM taking notes in any way?

[No response.]

The CHAIRMAN. Well, let the record show that unlike OSM, our West Virginia State Regulatory Authority, in the form of our Secretary of DEP, Stephanie Timmermeyer, is still with us. And I appreciate very much her being here to listen to the panels.

Mr. Morris, let me go back to something you mentioned about a mining operation taking place in Virginia, I believe it was, that is not permitted, and the state regulatory authority will not take any actions or inspect because it is not a permitted operation?

Mr. MORRIS. That is my understanding. This is not my case, it is Mr. Lovett's case, and perhaps he can give you some more detail.

But the claim by the citizens——

The CHAIRMAN. Did I have the state right? In Virginia?

Mr. MORRIS. It is in Virginia. The claim by the citizens is that a mining operator, in advance of approval of a mining permit for which the operator has applied, has already begun to conduct preliminary operations, which are surface coal mining and reclamation operations, without the permit.

According to OSM's regulations, and the regulations in Virginia as well, that constitutes an imminent danger to the environment. It is supposed to be addressed in the most expeditious and forceful way that either agency can possibly do it. And Virginia is refusing to take, as I understand it, to allow the citizens, to take the citizens and even inspect the area because it hasn't issued a permit yet.

And of course, the long and short of that is that any operator who goes forward without a permit in Virginia would be immune from action by the regulatory authority. They would never go out and look for it because they haven't issued a permit for it yet. It is absurd.

The CHAIRMAN. Mr. Lovett, can you expound on that?

Mr. LOVETT. I agree with what Mr. Morris said. That is exactly what has gone on.

In addition to that, because the state refused to take the citizens up, we asked OSM to take the citizens up. And that has been more than two weeks, OSM still has not done so. The people are being just completely disregarded by both agencies in Virginia.

The CHAIRMAN. It is reminiscent, in my opinion, of the old days of the two-acre exemption and the chain of pearls. And we thought we had closed that exemption, and evidently we have not.

Mr. MORRIS. Well, Mr. Chairman, in this situation it not a small chain-of-pearls-type operation. This is a huge mining permit, and the operations that are going on, according to the citizens' allegations, are extensive.

The CHAIRMAN. All right. Mr. Lovett, everybody we have heard from so far today seem to be the most negative of everybody. I mean, you state our future generations will not forgive us. You know, I take that as an affront. I go to bed at night and sleep soundly, and think I am doing all I can to protect our environment and provide for jobs. But there is an insinuation there that I am not.

You stated that we would be just as well off if OSM would disappear, and not be around. Let me ask, then, would we be just as well off if SMCRA were not ever enacted?

Mr. LOVETT. Mr. Chairman, first let me address your first point. I certainly didn't mean to cause affront to you personally; I am complicit in this, as well.

I think that our generation is currently decimating central Appalachia, and I believe my children will look back to me and ask me questions about it, as well. I use coal as well as anyone else. I don't mean to exempt myself from that, and I don't mean to cause you personal affront.

But I do take this as a very serious issue facing our region. And I think that all of us need to act to change it.

Second, in response to your question about OSM, I think that SMCRA has good provisions in it. It is a good law in many ways, if the agency would enforce them.

One of the questions you raised earlier was the question about approximate original contour. If the state agency or the Federal agency would enforce the requirement that the land look, after mining, like it did before mining, these mines wouldn't be occurring. Because very few of them are put to any productive use.

In fact, there are a handful of examples. Now, don't forget there have been over a million acres stripped in this region since the passage of the Act. And yet there are a handful of projects. There aren't golf courses—I think there is one golf course. There aren't schools. Those are exaggerations of what is going on. These are very isolated mines, and there is really almost no development on them at all.

So yes, I do believe that OSM's failure to enforce the Act has rendered it meaningless right now. I hope that we have a better Administration that will be willing to enforce the Act in the future.

The CHAIRMAN. OK. SMCRA requires its sediment ponds be constructed to control runoff from mining operations, including mountaintop mining operations in valley fields. Do you agree with that statement?

Mr. LOVETT. I do.

The CHAIRMAN. Mr. Morris, let me ask you then. Your experience in the Solicitor's Office lends great credence to what you have to say. Would you expand on what you termed as a judicial misinterpretation of the Act's citizen supervision?

Mr. MORRIS. Well, the decision of the Fourth Circuit in West Virginia Coal Association v. Bragg, or actually I think it is Bragg v. West Virginia Coal Association, proceeded on the theory that ap-

proved state programs under the Surface Mining Act are purely state law; that they are not a hybrid Federal and state law, even though Federal approval of those statutes is necessary before they can take effect, and even though those statutes are codified, state statutes are codified in the Federal rules, the Code of Federal Regulations.

Using that theory, that judicial misinterpretation, the Court went on to say that the provision that this committee and the Congress put in the Surface Mining Act authorizing adversely affected persons to sue state regulators in Federal Court to compel compliance with mandatory non-discretionary duties was unconstitutional, under the 11th Amendment, because the 11th Amendment will not allow private citizens to sue state officials for violations purely of state law.

But when Mr. Lovett brought the case that became Bragg v. West Virginia Coal Association, he was suing state officials to comply with the state program itself, which is, in our view, and in the view of the Department of Justice, stated to the Fourth Circuit in the very case, both Federal and state law, and thus the citizen supervision, is entirely constitutional and doesn't offend the 11th Amendment in any respect.

What we have here is a judicial misinterpretation of the nature of state programs under the statute, that is repeated in a ruling of the Third Circuit, and which the Department of Justice is no longer willing, as I understand it, to challenge in other circuits, that needs Congressional correction.

There are several ways, it seems to me, that the statute might be quickly and readily amended, but that correction needs to happen because without it, citizens cannot use the Federal forum to compel state officials to carry out mandatory duties under the statute, even where it is clear that the state officials are failing to do their job. As it was, as Judge Haden pointed out in Mr. Lovett's case, in the Bragg case, it was clear. And the Fourth Circuit did not have any quarrel with the merits, didn't even reach the merits.

So I repeat my urging for the Committee to take a very serious look at correcting that problem.

The CHAIRMAN. Very interesting. I appreciate that. I do have a couple more questions, but I am out of time, and I want to yield to the, or excuse me, recognize the Ranking Member for his questions.

Mr. PEARCE. Thank you, Mr. Chairman. I appreciate each one of you for testifying today.

Mr. Wright, do you think that coal has a place in today's energy portfolio?

Mr. WRIGHT. I believe it is not going to be feasible any time soon to remove it completely out of the portfolio. I do believe we need to further diversify our electricity portfolio to include more renewable sources, such as wind and solar. I think it is easily achievable, given today's technology, to have a renewable electricity standard of 10 percent or 20 percent, have that achieved.

Mr. PEARCE. What level could we achieve, in your opinion?

Mr. WRIGHT. Ten to 20 percent.

Mr. PEARCE. Mr. Lovett, you, in the opening part of your statement—it is not actually part of the written statement, but your

oral testimony—you were trying to distance yourself from the views in the second panel, and said that you would like to contrast that.

Now, I heard a balance of views there that were reassuring, but I think most reassuring was Secretary Timmermeyer's testimony. And so you would describe her testimony as rose-colored? What would you—because I had commented walking out that I was greatly reassured that they were achieving a balance of regulation and business interests. How would you characterize that testimony?

Mr. LOVETT. Well, I have had long-running disputes with the West Virginia Department of Environmental Protection. I do not believe that it is discharging its duties under the Surface Mining Act to require reclamation.

It may be true that trees can be grown on these sites after mining. Professor James Burger at Virginia Tech has done significant research—I think it would probably be fair to call him the foremost reclamation specialist in the country—that shows that trees can be grown after mining.

But it requires a couple things. It requires that the topsoil be saved, as the Act requires. And it requires that the next layer, the brown, weathered sandstone, part of that be saved, as well.

Mr. PEARCE. Excuse me, I was asking for you to reflect on her testimony.

Mr. LOVETT. OK, I will make it quicker. The DEP refuses to require operators to save that topsoil, even though it is required by the Act. And because it does so, there is no indication that trees will grow on any of these sites.

So to the extent that we are saying that reclamation is being achieved by state regulations——

Mr. PEARCE. Excuse me, we are right back where we were. I was just asking you to characterize her testimony.

Mr. LOVETT. Oh. I disagree.

Mr. PEARCE. And so you find it to be false. You find her testimony to be false.

Mr. LOVETT. I disagree with it, yes.

Mr. PEARCE. Would you shut down all coal mines?

Mr. LOVETT. No, of course not. My lights would go off like everyone else's if that happened.

Mr. PEARCE. So you think that coal—in your testimony you say that there is no such thing as clean coal.

Mr. LOVETT. I believe that. That is why I tell my kids to turn the lights off.

Mr. PEARCE. So you are content with global warming effects that are attributed to coal, because you say there is no such thing as clean coal. You are satisfied with those effects into the future. If you don't have clean coal, and sequestration is a dream that is probably 40 years in the future, frankly, so you either shut down the mines, or you understand that we don't have clean coal.

Mr. LOVETT. I misunderstood your question. I thought you were asking me if we should shut down the mines today. The answer to that is no. I do believe that we need to start making a transition away from a coal-based energy economy to more renewables and to more conservation.

Mr. PEARCE. Do you think Mr. Wright was correct, that we can achieve 20 percent right now?

Mr. LOVETT. I don't know the answer to that. I believe that we need to make a serious effort as a country to wean ourselves from coal. I don't see that happening.

Mr. PEARCE. Do you think that the lack of preserving of the topsoil that you are bringing up, do you think that is because of just bad corporations? Or do you think it is feasibly impossible?

Mr. LOVETT. I don't think it is because of bad corporations. I think that corporations do what agencies allow them to do. I think that the Act clearly requires that topsoil be saved, unless it can be shown that there is a substitute that would be better than the topsoil for the use.

I think that growing trees, growing our native trees, our Appalachian trees requires a slightly acidic soil, like the one we have.

Mr. PEARCE. Do you see any countries around that do have the correct standards? I mean, like the Chairman, I find you to be somewhat disappointed maybe in the environment that exists today, the environment and the regulatory agencies.

Do you find a country where that is carried out more properly?

Mr. LOVETT. I don't know what happens in other countries. I have great hopes for our country. And all I can do, of course, is try to work in my state and in my country to make it as good as I can.

I don't mean to be a negative person. Generally I don't think of myself that way, and I apologize if that is the impression here.

Mr. PEARCE. So you could not, in other words, you do a pretty good job of absolutely ripping every regulator, every department that is engaged in this. I think many times I am like the Chairman; I find that very strong.

So if you have an opinion, then it would be productive for us to see good examples. If those good examples don't exist in the world, it just might be that you are not the only one correct; that maybe the regulators are doing the best they can with a very bad situation. And in fact, maybe those trees might grow.

Mr. Chairman, I would like to finish. I have some more questions, too.

Mr. LOVETT. May I answer the question? I do think that the previous Administration was making an effort, the Clinton Administration was making an effort to change these things. I think that I am negative about the Administration that is currently in office, because it has gone out of its way, I think, to help weaken enforcement in our region. I think that, and I hope that we will get the next Administration, whether Republican or Democrat, that will take more seriously the concerns that we have.

Mr. PEARCE. Would any of the four of you, I will just go down the row, would you favor nuclear energy? Mr. Morris?

Mr. MORRIS. That is out of my field, Congressman.

Mr. PEARCE. Or are all of us going to have to turn on the switch and get electricity? I understand. Mr. Lovett?

Mr. LOVETT. I am the same. I don't know the answer.

Mr. PEARCE. Mr. Wright?

Mr. WRIGHT. Well, as I said earlier, I am in favor of diversifying our electricity portfolio. I think there is cheaper options out there than nuclear.

Mr. PEARCE. Which options would that be?

Mr. WRIGHT. Wind is comparable with the modern-day coal plant. It would have to be built today and beat all the modern environmental requirements.

Mr. PEARCE. Are you aware that coal, I mean that wind places a tremendously large footprint on the environment? That the footprint left by one wind generator is maybe—I forget exactly, they testified in here—about six or eight times the size of an oil well. And that an oil well can be drilled out this way, so you get one footprint. The wind generators have to be multiplied. And do you think that wind, then, is a satisfactory environmental solution?

Mr. WRIGHT. Yes. And I have talked with farmers who are putting wind turbines onto their own property, and they are going to be able to farm right up to the base of that wind turbine.

Mr. PEARCE. No, believe me, I agree. I think we should have energy, and I think we should have renewable. And the wind, the testimony is pretty far into the distant future. And unlike you, the specialists in the industry say that it is not as economic; that in fact, we are actually subsidizing it quite heavily. Wind is subsidized.

We want to shut off coal, and we think that it is not suitable for the environment. But we, frankly, the industry has testified that your 20 percent threshold is not achievable in the near future, and it might be 20 or 30 years away. That in fact it is 1 percent that it produces today. And converting from a 52 percent producer of energy to a 1 percent, and causing that 1 percent to expand geometrically 50 times, is technologically not capable.

But also, there is no transmission to and from. That is one of my problems with the bill that we just passed out of here, that we tried to encourage transmission corridors for the renewables, wind and solar. But those transmissions corridors were deeply harmed in H.R. 2337.

And so I do wonder at some point what we are going to do for energy. I think that Mr. Roberts testified on the previous panel that we are going to see 30 percent and 40 percent increases. And it is the low-income people in our population that are going to really suffer those increases.

Mr. Chairman, I think I have finished. Thank you very much.

Mr. WRIGHT. If I could respond to that. I have heard similar industry claims. We have just gone through this debate in our own state, and we did a comprehensive rate base analysis of what the impact of a 10 percent renewable electricity standard would be on Indiana electricity rates. And based on the data we gathered, we only found a 1 percent to 2 percent cost increase from that 10 percent renewable electricity standard.

Meanwhile, the industry came back and was claiming anywhere from 5 percent to 10 percent, but they refused to release any of the data on where they received, were able to calculate those figures from.

So you will excuse me if our publicly available data comes up with one result, but I am somewhat skeptical when industry comes back with a completely different result, and refuse to release any of the data on how they reached it.

The CHAIRMAN. Thank you. Before proceeding with my last questions, I see that Mr. Conrad is still with us in the back of the room, with the Interstate Mining Compact Commission. And I understand Virginia is a member of your organization.

And if you could help us get to the bottom of this unpermitted mining issue that Mr. Morris brought up, I know this committee would appreciate it.

Mr. CONRAD. I had thought of it, Mr. Chairman.

The CHAIRMAN. Thank you. I take that as an affirmative answer, for the record. Thank you.

Mr. Wright, let me ask you to expand, if you would, on the coal power plant combustion waste issue. As you know, I am the one who requested the National Research Council study to which you referred.

For instance, to what extent are you aware that these waste residues are being employed in mine reclamation?

Mr. WRIGHT. First of all, thank you for calling for that report. I can't say nationwide. I know, just for example, Indiana. We have calculated the total permitted tonnage currently existing, and it is 125 million tons just for Indiana mines. That is about as much as produced nationwide in one year.

And I believe in Pennsylvania and West Virginia, there is even more large-scale dumping. So we are talking on the order of hundreds of millions of tons being planned to be shipped to these mines.

The CHAIRMAN. Over what time period is that?

Mr. WRIGHT. Again, I can't answer that off the top of my head. There is going to be a report coming out on the Pennsylvania program soon that should have a little bit more details on that.

The CHAIRMAN. Would you share those——

Mr. WRIGHT. Yes.

The CHAIRMAN.—results with this committee?

Mr. WRIGHT. Yes.

The CHAIRMAN. Thank you. Ms. Pfister, certainly you have a great deal of experience with SMCRA; you stated that in your testimony, and you have a long and dedicated history. This committee certainly appreciates that.

From the perspective of the West, what is the single largest issue of concern? Is it the aquifer removal issue that you noted in your testimony?

Ms. PFISTER. I would say that it is, sir, because the water that lies within the mine permit area is basically considered, it is just like it is not there. Whatever time and fate does to it, that is what is going to be. There is no attempt to protect. There is water in some places that comes in on one side of the pit, goes into the spoils material, and then goes on down out the other way. There is no attempt to conduct that water to protect it from touching the soils materials, or completely absorbing and becoming a mud in the bottom.

And in the West, where you don't have a whole lot of streams, which is typical of eastern Montana and Wyoming, that groundwater is the resource. For instance, at Colstrip, Montana, they have disturbed around 22,000 acres. So you have basically got 22,000 acres of unpredictable water quality in that area. And of

course, eventually the pollution in the mine moves as a plume down the country.

So what you are trying to do in the mine would be to minimize the amount of water quality degradation that you get as a result of mining.

There is no thought, no experiments, no technical studies on how to do this. It is just mine it and dump it back in. And I would say that is the worst problem. Because if we don't have water in the West, we don't have anything.

The CHAIRMAN. So you have Clean Water Act issues here, as well.

Ms. PFISTER. You certainly would if you threw in some coal combustion waste. But with what you have, I don't know if it is clean water, but you are just not supposed to make it so terrible that you can't use it.

And of course then you have your water quality standards, your Class I, your Class II, and your Class III. But eventually there comes a point when a cow won't drink it, either.

The CHAIRMAN. OK, thank you. Do you have any further questions?

[No response.]

The CHAIRMAN. Thank you very much for being with us today.

Mr. MORRIS. Thank you, sir.

The CHAIRMAN. Our next panel, number five, is composed of the following individuals: Harold P. Quinn, Jr., Senior Vice President, Legal and General Counsel, National Mining Association, Washington, D.C.; William B. Raney, President, West Virginia Coal Association, Charleston, West Virginia; Eric Fry, Director of Regulatory Services, Peabody Coal Company, St. Louis, Missouri, on behalf of the Illinois Coal Association; and Marion Loomis, Executive Director, Wyoming Mining Association, from Cheyenne, Wyoming.

Gentlemen, we welcome you to the Committee. We appreciate the sacrifices you made to be with us today, the travel and being with us for close to five hours now. So we appreciate your patience.

Hal, you may go first. Good to see you again. And Bill, it is always good to be with you, as well.

STATEMENT OF HAROLD P. QUINN, JR., SENIOR VICE PRESIDENT LEGAL AND GENERAL COUNSEL, NATIONAL MINING ASSOCIATION, WASHINGTON, D.C.

Mr. QUINN. Thank you, Mr. Chairman. Good afternoon, and good afternoon, Congressman Pearce. I appreciate your attendance today.

We appreciate the opportunity and the invitation to be here to speak about our SMCRA experience on this 30th anniversary.

Let me begin by an observation that I suspect that among those on hand when President Carter signed Public Law 95-87 on a summer morning 30 years ago, only a few perhaps would have forecasted the successes of this coal industry and the state and Federal regulators in both responding to the nation's increasing demand for more energy and improved environmental performance.

In the 30 years since SMCRA's enactment, the coal industry has supplied over 29 billion tons of coal to fuel our nation's energy re-

quirements and prosperity. This is the equivalent of 115 billion barrels of oil, and is five times our proven domestic oil reserves.

In the meantime, over 2.2 million acres of land supplying this coal resource have been restored to a wide variety of productive uses, including farmlands, as we see here in Indiana, pasture lands, wildlife refuges, gold courses—a stunning and challenging gold course, Twisted Gun in West Virginia—as well as wetlands and timberlands, recreational areas, and areas for even commercial development.

These achievements of the first order in energy production, environmental stewardship, and reclamation are the product of collective efforts of the coal industry and state and Federal governments. They underscore the underlying strength of America's coal resource as a foundation of our nation's prosperity and energy security.

Now, SMCRA was the culmination of a sustained effort throughout the 1970s to enact a comprehensive Federal regulatory program for coal mining. I recall that in the 1970s, our nation was in the throes of an economic turmoil related to its vulnerable dependence upon foreign sources of energy. SMCRA attempts to strike a balance between our nation's need for coal as an essential energy source, and our need to protect the environment.

This balance rests upon several key principles. First, coal is an indispensable and prominent part of our nation's energy requirements and prosperity.

Second, coal mining should serve as a temporary use of the land.

Third, coal mine development and resource management must be integrated to successfully restore mine lands to support future uses.

And finally, given the diversity in terrain and other physical conditions among our coal mining regions, states are best positioned to develop and administer programs designed to meet those objectives.

SMCRA is an ambitious law. Its protracted and contentious legislative history caused some of your colleagues to predict that the law's implementation would meet with regulatory delays and endless litigation. Unfortunately, the early SMCRA experience would not disappoint them.

The first attempt to implement the permanent regulatory program produced 150 pages of regulatory text to flesh out what was already a fairly descriptive 90-page statute. This regulatory text was accompanied by another 400 pages explaining what that regulatory text actually meant. The detail and the complexity of the regulations defy comprehension by those charged with complying with it, the industry, as well as those who are tasked to implement it, the states. I suspect that it even challenged the comprehension of the legal minds that produced the product itself.

Several years later the program was revised to substitute performance-based approach for inflexible design standards, and to empower the states to tailor more suitable versions to accommodate their regional differences.

Not surprisingly, based on this experience, SMCRA implementation has proven a fertile ground for litigation. About a little past a decade into its implementation, one court observed this history or captured aptly this history with the following metaphor begin-

ning its opinion on a rules challenge. "As night follows day, litigation follows rulemaking under this statute."

But from there, the program also experienced a difficult transition from its initial phase of shared Federal and state responsibilities to the permanent phase that vested day-to-day regulatory authority with the states. The coal industry expected to find, during this permanent phase, only one regulatory master in the field: the state. Both for purposes of inspections, as well as permitting. Instead, the coal industry often found itself positioned between conflicting state directives and Federal demands.

Further complicating the regulatory transition were structural changes the coal industry was, upon the coal industry by both market forces and public policy choices. These changes included rapid consolidation within the industry driven by falling prices in coal, which required a powerful and sustained increase in mine productivity to cope with these decreasing margins.

At the same time, public policy choices and the Clean Air Act created a dramatic shift in coal production on the eastern coalfields to the western United States.

As we have already mentioned, it was through perseverance and innovation that the coal industry has mastered the demands of the law. We have made a substantial investment, and we can report some impressive successes. As I previously indicated, we restored 2.2 million acres of land to productive uses. We have provided wildlife habitat for a diverse variety of species, created recreational areas, paid over $8 billion in abandoned mine land taxes to restore unreclaimed lands, mines, prior to SMCRA, and we have developed innovative reclamation and technology practices.

These accomplishments have all occurred while the coal industry continues to supply the fuel that accounts for one third of our primary energy production, and over half of electricity produced in the United States.

Tomorrow's successes will depend largely upon the lessons we have learned from our 30-year experience under SMCRA. At this point, I would like to just mention a few that we find particularly instructive.

First, when it comes to regulatory approach, design standards versus performance standards, we find that the early reliance on successfully prescriptive design standards compounded the complexity and detail of the statute. Performance standards have been far more effective and responsive to the very conditions under which mining operations operate. We believe the switch to performance standards in the 1980s has contributed greatly to the mine land reclamation successes we see today.

On state primacy, each state and region has different conditions and needs and interests when it comes to land use. Mr. Chairman, as our mutual friend, Ben Green, former President of West Virginia Mining and Reclamation Association, once advised, a perfectly good hunting dog in Wyoming may not hunt in West Virginia, and vice-versa.

SMCRA recognizes this. Indeed, state primacy is the cornerstone law because good ideas and practices in one state for meeting a national goal may not be a good one in another.

However, right now it appears that state primacy may be threatened by fiscal constraints to some of these states that jeopardize their continued retention of their programs. The time may be coming to consider adjusting the laws matching the Federal funding formula in order to support the continuation of state primacy.

Regulatory duplication and efficiency is still a remaining legacy of SMCRA. While SMCRA established a comprehensive program for regulating the effects of coal mining, it did not displace all existing laws that address the specific resources coal mining affects.

A prominent example is the Clean Water Act, which overlaps SMCRA's extensive requirements for hydrologic analysis and measures to protect water quality. We believe that by relying more upon the regulatory benefits of SMCRA, we can avoid the unnecessary duplication, and achieve greater regulatory efficiencies.

Let me close with this one observation. When President Carter signed SMCRA three decades ago, energy independence was a national imperative. It is no less so today. Since SMCRA's passage, our energy use has jumped 23 percent, but our energy production has increased by only 7 percent. Meanwhile, energy imports have climbed by 70 percent.

There is no question that our nation will require more energy in the future; the only question is where we will find it.

Not surprisingly, it is expected that coal will remain a vital national resource. Coal consumption is projected to increase by 50 percent through 2030 just in order to meet our future electricity requirements.

Meeting these demands will be a challenge, but a challenge that can be met with policies that enhance the role of all our energy sources, including coal. SMCRA will continue obviously to play a major role in that effort.

Thank you, Mr. Chairman. Thank you, Mr. Pearce, for your attention today.

[The prepared statement of Mr. Quinn follows:]

Statement of Harold P. Quinn, Jr., Senior Vice President & General Counsel, The National Mining Association

My name is Hal Quinn, senior vice president, legal and regulatory affairs, and general counsel for the National Mining Association (NMA). I am appearing on behalf of the NMA to testify about the coal mining industry's experience and success under the Surface Mining Control and Reclamation Act (SMCRA) of 1977. I suspect that among those on hand when President Carter signed Public Law 95-87 on a summer morning 30 years ago, only a few would have ventured to predict the many successes of America's coal industry in responding to the nation's increasing demand for more energy and improved environmental performance.

NMA represents producers of over 80 percent of America's coal—a reliable, affordable, domestic fuel that is the source of more than 50 percent of the electricity used in America. NMA's members also include the producers of metals and non-metal minerals, manufacturers of mining equipment and supplies, transporters of coal and mineral products, and other firms serving the mining industry.

General Introduction

In the 30 years since SMCRA's enactment, the coal industry has supplied over 29 billion tons of coal to fuel our nation's growth and prosperity. This is the equivalent of 115 billion barrels of oil and is five times our proven domestic oil reserve. Over 2.2 million acres of the lands supplying this coal resource have been restored to a wide variety of productive uses including farmlands, pastures, wildlife refuges, parks, recreational areas, wetlands, and commercial development. These achievements of the first order in energy production, environmental stewardship and reclamation are the product of the collective efforts of the coal industry, and state and

federal governments. They underscore the underlying strength of America's coal resource as the foundation of our nation's prosperity and energy security.

SMCRA Legislative History

SMCRA was the culmination of a sustained effort throughout the 1970's to enact a comprehensive federal regulatory policy for coal mining. Unlike environmental legislation directed at the impacts of many industries upon one natural resource—e.g., Clean Water Act, Clean Air Act—SMCRA focuses upon one industry and its effect upon various natural resources. As the legislation proceeded through successive congressional sessions, the product transformed from a 17-page version passed by the House of Representatives in 1972 to a 90-page bill reported by the conference committee and signed by President Carter on the morning of August 3, 1977.

Throughout the protracted legislative process, one theme emerged to become the central purpose of the law: strike a balance between our nation's need for coal as an essential energy source and protection of the environment. Recall that in the 1970's, this country was in the throes of economic turmoil related to its vulnerable dependence upon foreign sources of energy. The oil embargo in October of 1973 focused attention on domestic energy security and the ability of our domestic coal resources to meet increasing energy requirements. At the same time, concerns existed about the potential environmental consequences of increased coal mining.

The balance SMCRA intends to strike between meeting our energy needs and environmental protection rests upon several principles. First, coal is an indispensable and prominent part of our nation's energy requirements and prosperity. Second, coal mining should serve as a temporary use of the land. Third, coal mine development and resource management must be integrated to successfully restore mined lands to support future uses. And, fourth, given the diversity in terrain and other physical conditions among our coal mining regions, states are best positioned to develop and administer programs designed to meet those objectives.

Industry's SMCRA Experience

The protracted and contentious legislative history of SMCRA caused some lawmakers to predict that the law's implementation would meet with regulatory delays and endless litigation. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 193 (1977). The early SMCRA experience would not disappoint them. The first attempt to implement the entire range of permanent program requirements produced 150 pages of regulatory text to "flesh-out" an already prescriptive 90-page statute. An additional 400 pages were required to explain what the regulations meant. Several years later, a comprehensive review of the rules converted some of the unyielding design standards to more flexible performance standards and empowered states to tailor more suitable versions to accommodate regional differences.

Not surprisingly, SMCRA implementation has proven fertile ground for litigation. The battles waged over SMCRA implementation have extended from the most fundamental questions about the jurisdictional reach of the law to the more arcane, such as the permissible conservation and husbandry practices to demonstrate successful reclamation. One court aptly characterized this early regulatory history with the following metaphor: "As night follows day, litigation follows rulemaking under this statute." National Wildlife Federation v. Lujan, 950 F.2d 765, 766 (D.C. Cir. 1991).

Apart from the turmoil accompanying efforts to establish the basic regulatory framework, the program experienced difficulty in its transition from the initial phase of shared federal and state responsibilities to the permanent phase that vested day-to-day regulatory authority with the states. In the field, the coal industry expected to see only one regulator, the state, for both permit and inspection tasks. The states shared a similar expectation since SMCRA declared that they would assume "exclusive" regulatory jurisdiction upon approval of their laws and regulations, and that the Federal Office of Surface Mining (OSM) would recede to a secondary role of overseeing state performance. In practice, the coal industry found itself positioned between conflicting state and federal applications of the law. States saw their exclusive role undermined with little deference or respect accorded to their applications of the law by OSM.

Serving two regulatory masters further compounded the difficulties coal companies confronted in complying with changing regulations. Uncertainty becomes especially frustrating to a regulated industry that operates under a statute that places a premium upon the principles of planning and sound resource management. The absence of a stable regulatory framework undermines the planning imperative. Changing standards and inconsistent application compromise the integrity of any planned strategy.

Changes in Industry Structure

In the midst of this regulatory transition, the coal industry experienced structural changes as a result of a combination of market forces and public policy choices. The number and size of coal mines and companies changed substantially. When SMCRA was debated, economic analysts predicted that coal prices would soon exceed $50 a ton. These forecasts proved well off the mark. The average price of coal in real terms declined $10 per ton in just 10 years (1975-1985), and by 1988 it fell to $22 a ton.

These market conditions forced a rapid consolidation within the industry. Between 1976 and 1986 the number of producing coal mines dropped by 32 percent (from 6,161 mines to 4,201 mines) while production increased by almost the same percent (from 685 million tons to 886 million tons). The remedy for the diminishing margin between increasing mining costs and decreasing coal prices was a powerful and sustained increase in productivity, i.e., more production from fewer and larger mines and companies. The trend in consolidation continued, and the coal industry today produces 40 percent more coal (1.2 billion tons) from 75 percent fewer mines than it did just before SMCRA's enactment.

Perhaps the most significant development related to coal markets over the past 30 years is the shift in coal production from the Eastern coalfields to the Western United States. Coal demand in the United States is driven by the electric power sector, which consumes 90 percent of annual coal production. The policy choices arising over the last two decades under the Clean Air Act substantially influenced the fuel choices made by the electric power industry. The increasingly more stringent limits on emissions of sulfur dioxide at power plants made low-sulfur coal in the Western United States a cost-effective compliance strategy for many power plants. Favorable geologic conditions and economies of scale off-set the disadvantages some Western mines confront due to their distance from markets. As a result, coal produced from mines west of the Mississippi—which accounted for only 25 percent of the annual production in 1977—comprises almost 60 percent of production today.

SMCRA Successes

Both the industry and the SMCRA program have evolved over the past 30 years. Through persistence and innovation and aided in part by maturation in the administration of the regulatory programs, the industry has mastered the demands of the law. We are hopeful the program has turned the corner where conflict has given way to cooperation, and litigation has been replaced by innovation. The investment to date has been substantial, and we can continue to report impressive returns:

- Restoration of 2.2 million acres of land to productive uses—three times the size of Rhode Island;
- Farmland with crop yields that exceed their pre-mining capabilities;
- Pasture lands that support grazing of more livestock per acre than pre-mining capabilities;
- Wildlife refuges providing new habitats for a diverse variety of species;
- Recreational areas to support fishing, hunting and other leisure activities;
- Forest lands;
- Sites in steep slope terrain that will support commercial, residential and economic development in areas where land suitable for such purposes is limited or unavailable;
- Payment of over $8 billion in Abandoned Mine Land (AML) taxes to restore unreclaimed mined lands abandoned prior to SMCRA;
- Restoration through remining of more abandoned mined lands than the AML program—at no cost to the AML program; and
- Innovations in reclamation technology and practices including post mining landscape design and land use planning, water management and treatment technology, and ground control and subsidence mitigation measures.

These accomplishments have all occurred while the coal industry continues to supply our nation annually with the fuel that:

- Generates over half of all the electricity in America;
- Affordably furnishes the power to support over 151 million Americans in all activities of their daily life;
- Reliably provides the power to support employment of almost 127 million Americans; and
- Accounts for one-third of our primary energy production—the largest portion of any energy source.

Lessons Learned

It would be imprudent to simply praise these collective achievements without drawing any lessons from the 30 years of experience in the implementation of

SMCRA. Tomorrow's successes will depend largely upon whether we learn anything from our past.

Design vs. Performance Standards: Some have observed that the excessive complexity and detail of the statute, compounded by the zeal of the federal agency to outdo the legislators with even more detailed regulatory design standards, defied comprehension—let alone implementation—by the industry and states, and even by the legal minds that produced the regulatory product. Design standards are inherently inflexible and counterintuitive for national goals whose success will require the accommodation of diverse physical and geological conditions. A design standard approach to regulation stymies innovation. By contrast, a performance-based approach can accommodate new technology and advancements in mining and reclamation practices and is therefore more responsive to the diverse conditions found in the mining regions and an evolving industry. The switch to performance standards in the 1980's contributed greatly to the mined land reclamation successes we see today.

State Primacy: The regulation of land use, a historically local prerogative, on a national basis is difficult at best, and all but impossible if local, state and regional differences cannot be accounted for in the implementation of statutory goals. Each state and region has different needs and interests when it comes to land use. As our good friend, Ben Greene, the former president of the West Virginia Mining and Reclamation Association, once advised, "a perfectly good hunting dog in Wyoming may not hunt in West Virginia, and vice versa." But SMCRA recognizes this: indeed, state primacy is the cornerstone of the law precisely because good ideas and practices in one state for achieving a national goal may not be good ones in another. State primacy needs to be supported culturally and financially to assure continued success. For the most part, the earlier distrust of state capabilities has receded and has been replaced by respect and cooperation between the federal and state agencies. However, fiscal constraints in some states may jeopardize the continued retention of their programs. Consideration should be given to altering the law's matching federal funding formula, which is capped at 50 percent of program costs, particularly as one considers that some of the increased costs have arisen from new federal mandates imposed by OSM regulatory initiatives. The OSM experience in Tennessee is ample proof that investing a greater share of federal dollars into state primacy will save the federal government substantially, since the state programs have been dollar-for-dollar more cost-effective than a federal program.

Regulatory Duplication and Efficiency: SMCRA established a comprehensive program for regulating the effects of coal mining upon a wide array of natural resources. Nonetheless, it did not displace all existing laws that address specific resources, for example the Clean Air Act or Clean Water Act. In the past, this overlap has caused confusion and, at times, conflict for the industry in meeting overlapping program goals. The Clean Water Act is a prominent example of this overlap. SMCRA contains extensive requirements for hydrologic analysis, monitoring and protection requirements for coal mines. In some cases, federal and state agencies have strived to reconcile these programs and minimize duplication. Nonetheless, more can still be done to rely upon the regulatory benefits of SMCRA, avoid unnecessary duplication, achieve regulatory efficiencies and reap the attendant environmental benefits as envisioned by both the Clean Water Act and SMCRA.

Looking Ahead

As we reflect today upon SMCRA's 30th anniversary in light of today's energy picture, I cannot help but think of the film Back to the Future. When President Carter signed SMCRA that Wednesday morning in the Rose Garden, "energy independence" was a national imperative. It is no less so today, but it now goes by the name "energy security." Today, we import about 60 percent of our petroleum needs, a share that the Energy Information Agency (EIA) projects will grow to 75 percent by 2030. By that time, we will consume 28 percent more oil and 19 percent more natural gas. Yet the United States has only 3 percent of the world's oil reserves and not much more of its gas reserves. Since SMCRA's passage, our energy use has jumped 23 percent, but our energy production has increased by only 7 percent. Meanwhile, energy imports have climbed by 70 percent.

We sometimes forget that the United States is a growing country. Our population grew by almost 3 million people in 2005 and now exceeds 300 million. Our economic growth has eclipsed most mature economies. So, there is no question that our nation will require more energy in the future, just as it did 30 years ago, to sustain our economic growth. We will use energy more efficiently due to technological advances, conservation and increased efficiency. But, we will still use more energy. Not surprisingly, therefore, coal consumption is projected to increase from 22.9 quads in

2005 to over 34 quads in 2030, reflecting the 156 gigawatts of new coal-based generating capacity that are projected to be needed by the end of the EIA forecast period.

Meeting this demand with reliable, affordable and secure sources will be a challenge, but a challenge that can be met with the correct policies that enhance the role of all domestic energy sources, including policies that ensure that our coal resources can continue to play the critical role in our energy future.

Conclusion

Thank you for the opportunity to share with you the mining industry's experience under SMCRA and to express its views on the critical role of our domestic coal resources to our nation's energy security and prosperity.

FARMING

Crops growing on mined lands at Black Beauty's Farmersburg Mine in Indiana.

FORESTY & WETLANDS

Five wetland areas and 40 acres of hardwood at Tatum Mine in Texas.

RECREATION

Twisted Gun golf course
in West Virginia.

HOUSING

Single family housing
community in Montana.

STATEMENT OF WILLIAM B. RANEY, PRESIDENT, WEST VIRGINIA COAL ASSOCIATION, CHARLESTON, WEST VIRGINIA

Mr. RANEY. Mr. Chairman, members of the Committee, I am Bill Raney, and I am representing the West Virginia Coal Association, whose members collectively produce more than 85 percent of West Virginia's coal. And as was said earlier, we were the first state to gain primacy in 1979, under SMCRA.

I am also pleased and equally proud today to represent the associations from seven states of the Appalachian region of this country, in addition to West Virginia. Those would be Virginia, Maryland, Pennsylvania, Ohio, Kentucky, that all surround us, and our southern neighbor, Alabama.

When you think about all those who are mining the coal and protecting the environment in those seven states, I am very fortunate to be representing more practicing environmentalists than any organization in this country, and I suggest in this world. More than 20,000 of them in West Virginia are digging coal every day. More than 13,000 of them belong to Cecil Roberts' organization across the seven states.

There are more than 54,000 coal miners in these seven states, and that comprises more than 70 percent of all the coal miners in this nation. And every one of them, as I say, is a practicing environmentalist. Along with the thousands of specialty contractors, every day they are practicing mining stewardship. They are constructing ponds, backfilling, watering roads, maintaining ditches, protecting water quality, planting trees and native grasses.

They are protecting the land like it is their own, because they want their children and their grandchildren to hunt the same mountains and fish the same streams that they did when they were growing up. They are practicing environmental protection. They are not marching about it, nor are they preaching about it. They make it happen every day. And they are proud of their work, and we are extremely proud of what they do each day.

But we are concerned, Mr. Chairman, about them and their future, and we are here to ask for some help. We were supportive of SMCRA in 1977, upon its passage. And because of the changes you made, Mr. Chairman, so that the bill would be workable in the East. It provided for valley fills, it provided for mountaintop mining, and it provided for the reasonable regulation of steep-slope mining. It intended for OSM and SMCRA to be the one and only regulatory program for coal mining throughout the country. And we need to return to that solid foundation of 30 years ago. We need your attention to remove the conflicts and the overlaps that we see today.

The states and OSM continue to make professional progress, but other agencies are frustrating that process, as they have over the years. But more frustrating is the continued filing of opinion-based lawsuits attacking the very foundation of this Act by exploiting these overlaps between SMCRA and the Clean Water Act.

Lawyers and opponents who seem to offer no real alternative continue to file suit after suit, and threaten our people's jobs, despite each of those suits getting overturned on appeal every time.

Looking back, the purpose of the original legislation of striking a balance between the protection in the environment and the na-

tion's need for coal as an essential source of energy has been accomplished, and continues to be accomplished today. With all the attention being given to global warming today, being the sexy topic of the day it seems, the world has overlooked our leadership: West Virginia's leadership, Appalachian Region's leadership, and America's leadership, and the continued mining of coal, and the continued protection of our environment. We literally in America are the best in the world at mining stewardship, and no one seems to be paying any attention.

The Abandoned Mine Land Program created by SMCRA has been remarkably successful, with the reclamation of pre-law sites, the protection of healthcare for the United Mine Worker miners, and the installation of drinking water systems in many areas of rural America.

However, without new permits, expanded operations and continued mining, the benefits of the AML program and the UMWA, to the UMWA and to the mining states, will cease. And remarkably, we have judges in West Virginia who don't seem to make that connection.

Since 1977, SMCRA has provided for valley fills, drainage control, and mountaintop mining. And for 30 years the states and the industry have proven that those work. With consistent refinement, reclamation has been exceptional. The coordination of mining with highway construction and development has provided benefits thought impossible 30 years ago. It is the persistence of the industry and its vendors. It is the dedicated professionalism of our coal miners, the unique oversight of OSM, and the flexibility of the states that have combined with the solid platform of SMCRA to better protect the environment than ever before, as we continue to mine coal for our energy independence.

So, Mr. Chairman, you are to be complimented, because we are better today than we were yesterday. In 1996, as you may recall, Secretary of the Interior Bruce Babbitt stood on a mountaintop operation with valley fills in Boone County, West Virginia, and stated that this is what was intended when the law was passed in 1977. It is that way today. The intent of the law is being carried out, and we are proud of that.

However, there are judges and redundant lawsuits attempting to alter the 30-year-old wisdom of Congress, at the expense, and most concerning at the expense of our people in the East. A strong alliance for 30 years between the states, OSM, and industry has served this country well. And we hope you will help us, Mr. Chairman, preserve our future as we go through the next 30.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Raney follows:]

Statement of William B. Raney, President,
West Virginia Coal Association

Good morning, Mr. Chairman, members of the Committee, I am Bill Raney, President of the West Virginia Coal Association.

First, let me thank you, Mr. Chairman, as well as the members and staff of the Committee for the opportunity to participate in this oversight hearing regarding the 30th Anniversary of the Surface Mining Control & Reclamation Act ("SMCRA") of 1977. I am very proud to be here on behalf of the Coal Association's membership, which accounts for over 85 percent of the Mountain State's underground and surface coal production. Today's coal industry in West Virginia directly employs more than

20,000 miners and more than 25,000 contractors whose specialty skills and services are required to keep mines operating everyday.

For purposes of today's hearing, I am most proud to have been asked to also represent the Coal Associations from the states that collectively make up this country's Appalachian coal basin. In addition to West Virginia, those include Kentucky, Virginia, Maryland, Pennsylvania, Ohio and Alabama. In 2005, these states produced more than 37% of this nation's coal while employing more than 54,000 coal miners, nearly 70% of the country's total mining workforce. Again, using 2005 Energy Information Administration statistics, more than 62% of the miners in Mr. Roberts' United Mine Workers of America ("UMWA"), are working in one of these seven states. As you can see, this region is absolutely critical to sustaining this nation's energy production and the employment of a majority of America's coal miners (see generally attachments "A" and "B").

I am honored to represent the proud heritage of mining in this region that fueled the industrial revolution and made the United States the most powerful nation in the world. The Appalachian coal basin fueled the furnaces, foundries and mills that built the enduring infrastructure of this country, it powered the nation's railroad system and it helped America achieve victory in two world wars. The proud miners of today continue that legacy so they can raise their families and provide a future for their children in the same area where they were raised, the states of Appalachia. Continued coal mining in West Virginia and the eastern states is absolutely critical to this future.

That, Mr. Chairman, accentuates the importance of what you did thirty years ago. Your influence and involvement, recognizing the challenges of mining coal in the eastern United States, with provisions for steep slope and mountain top mining as well as the use of valley fills, allowed the bill to be passed and signed into law, after two previous vetoes and a difficult time in Congress. The passage of HR2 and the signing of Public Law 95-87 was important to the continued viability of mining in the Appalachian region as it proposed national standards for permitting while allowing states the flexibility to specifically tailor their regulatory programs to meet their unique needs through the innovative concept of primacy. These thirty years have not been without difficulty, conflict and heated exchanges, but the original platform of SMCRA remains in place and has been successful. It is important that this continue because the needs of the eastern U.S. industry are quite different from those of the industry in the Midwest and the Western states.

While the practicality of SMCRA has matured over the years through interpretation and regulatory implementation, it was the amazing foresight of its purposes that makes it more pertinent today than ever before. As you will recall, Mr. Chairman, thirty years ago the framers of this legislation stated one of the purposes of the Act was to

> ...assure the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.

When one considers the tremendous progress our society has made over the past three decades, most of which is energy-dependent, with the fact that America's coal production has nearly doubled in that same period, the relevance of that 30-year-old purpose is evident. Deliberate pursuit of that purpose is more important today than it was in 1977.

It is imperative that U.S. coal production increases so as to contribute to America's energy security and it is equally critical that production from the Eastern states be sustained in order to "keep America's lights on" and to provide Americans with a comfortable, convenient, electrically-dependant, lifestyle. In so many ways, the modern-day American dream is one that is coal-fired and it requires all of our coal, whether it comes from the East, the Midwest or the West. OSM's demonstrated ability to run SMCRA's national regulatory program while recognizing the needs of different regions is critical to this sustainment and America's continued growth as a model for reclamation and environmental protection throughout the world.

SMCRA has provided the "baseline" of legislation and regulation that has allowed our industry to answer the changing energy needs of this country and we have accomplished that with professional stewardship. It is SMCRA's solid foundation that has afforded our people the opportunity to "set the pace" for reclamation and environmental protection. No one ever gives credit to the states, OSM, Congress, the coal industry or our people for the fact that we are leading the world in mining stewardship. It is a fact and thereby, perhaps, not newsworthy! It is, however, something we point to with pride and is ever more important so as to preserve the jobs and professions of our more than 54,000 miners and thousands of specialty contractors.

Because all of our employees are "practicing environmentalists", working every day to insure their environment, the environment around the mine, is protected, preserved and maintained. Every time I get the chance I tell people I am proud to represent more "practicing environmentalists" than any other organization in the world. That is especially true today since I am speaking for the other six Appalachian coal-mining states. You see, each one of these miners or contractors is protecting the environment while they are mining or helping to mine our coal. They may be protecting water quality, restoring original land contours or providing for future developments, planting trees, constructing ponds and doing the myriad tasks required to insure that their children and grandchildren can hunt the same mountains and fish the same streams as they once did. These coal miners and practicing environmentalists are proud of their work to both fuel this country and protect its social and natural environment, and we are, of course, proud of them and their enormous contribution to the economy, security and social fabric of their native states and this great country and I am honored to speak on their behalf today.

While the reasonable implementation of SMCRA has provided a platform for these demonstrated achievements, it remains under constant attack by lawyers, groups and other federal agencies attempting to detract from its original purposes and intents. Congress intended, thirty years ago, for SMCRA to be the "brace" of protection as the primary environmental enforcement structure for coal mining throughout the federal government and to standardize the complications of permitting and regulation among the states and Indian reservations. SMCRA was to literally "level the field" of requirements among the states and other federal agencies for permitting, operating and reclaiming mine sites throughout the country.

Despite this intent for SMCRA to be the "federal baseline", some 30 years after its passage there remains conflict and uncertainty. SMCRA encouraged and, in some cases, directed other federal agencies, i.e., EPA, the Corps of Engineers and other Department of Interior offices and services, to cooperate with OSM. SMCRA's regulatory requirements were to become the platform for evaluating and permitting mining operations, no matter where they were or what type of operations they proposed. Here we are thirty years later and that still has not happened. That "overlapping redundancy" provides fertile ground for harassing lawsuits and judicially inspired regulatory confusion, which is typically overturned at the appeal court level.

Since 1997, there have been scores of federal lawsuits challenging the very foundation of the mining regulatory structure sanctioned and approved by Congress in 1977. Most of these challenges centered on the practice of valley fill construction. All coal mining, surface and underground, in the steeply sloped terrain of Appalachia is dependent on the ability to construct valley fills, a practice that was started in West Virginia and recognized by Congress in SMCRA as the best possible way to safely and permanently store the excess dirt and rock not needed to restore the approximate original contours of the land following the completion of mining (see attachment "C", relevant pages from OSM's implementing regulations, attachment "D", relevant pages from a decision from the U.S. Court of Appeals for the Fourth Circuit decision regarding SMCRA and the practice of valley fill construction and attachment "E", photographs of active and reclaimed valley fills). As you may recall, Mr. Chairman, this was one of the issues that was addressed before the bill was approved in 1977. However, time and time again federal judges, reacting to the claims of extremist environmental groups, have interpreted the Clean Water Act to outlaw the very activities that Congress approved in SMCRA.

For example, SMCRA mandates the installation of ponds below valley fills. These sediment ponds were recognized by Congress as the best technology available to control runoff and meet water quality standards from mining operations (see attachment "F", photographs of valley fills and in-stream ponds, attachment "G", relevant pages from an OSM-published Handbook for Small Mine Operators and attachment "H", relevant pages from OSM's implementing regulations). In June of this year, a federal judge, reacting to an extremist lawsuit, ruled that these ponds cannot be constructed because they are illegal under the Clean Water Act. So, we have a federal judge using one statute to outlaw another agency's regulations, despite 30 years of outstanding experience and accomplishment through OSM's interpretation and implementation of SMCRA.

All of that frustrates the development of mining operations in Appalachia and needs Congressional attention. The overlaps that exist between SMCRA and the other federal environmental laws and programs need to be addressed with the same intent as expressed in 1977 that SMCRA was and is to be the "federal baseline" for permitting and enforcement of mining operations throughout the country. While some agencies have perpetuated this confusion, the U.S. Army Corps of Engineers through its Assistant Secretary for Civil Works and its Huntington and Pittsburgh District offices have done as much as possible to reduce and eliminate conflicting

program requirements under SMCRA and section 404 of the Clean Water Act. Despite the cooperative efforts of these two agencies pursuant to SMCRA, lawyers continue to attempt to stop mining in West Virginia and take the jobs of our miners and disrupt their lives and the lives of their families. These lawyers, which usually end up being paid by the federal government, are exploiting these "redundant overlaps" among the programs. We hope you and the Committee will give this matter your prompt attention because the original intent of SMCRA was clear in 1977 and has typically withstood many legal tests.

As mentioned earlier, the 1977 Act showed great foresight and vision relative to America's importance as a leader in balancing the world energy needs and protecting its environment. SMCRA is also unique in that it provided not only the structure for regulation of future coal mining activities, it also established the Abandoned Mine Lands (AML) program, funded entirely by a tax collected on active coal production, to address the environmental, social and infrastructure problems presented by older sites that had been mined prior to the passage of SMCRA. It is important to emphasize the fact that this entire program is paid for completely with industry money because many Americans are not aware of the benefits of this program and the fact that it is funded entirely by the industry. This successful program continues to reclaim "pre-law" mine sites, install much-needed infrastructure in rural mining areas, address emergency situations from past mining and provide medical benefits for thousands of the retired coal miners and their dependents. Again, the foresight and vision of SMCRA, as expressed in 1977, is evidenced in the successful AML Program. However we feel more credit needs to be given to the fact that this program is funded with money from today's coal production and how important it is for coal mining to continue so the AML program can be sustained at the same level of funding. Lawyers and judges need to recognize the implication of diminished domestic coal production on this notably successful program of environmental remediation, infrastructure development and social rescue.

Back in 1977 West Virginia's pre-SMCRA mining environmental program served as the model for this federal legislation and West Virginia was the first state to obtain primacy under the cooperative federalism structure established by Congress that recognized not only the need for a level playing field of regulation for the sake of interstate commerce and environmental protection but also acknowledged the expertise of the individual states to regulate activities occurring within their own borders.

We believe that SMCRA and the administration of its implementing regulations by the Office of Surface Mining have been largely successful. Again relying on Congress' stated purpose that the country's need for energy must be balanced with environmental protection, one only has to realize that coal production has increased since the passage of the Act in 1977 at no sacrifice to the natural environment.

Sure, there have been growing pains over the years, where industry and sometimes even state regulators have disagreed with OSM but, by and large, we believe that SMCRA has achieved the environmental goals envisioned by this Congress 30 years ago, just as former Secretary of the Interior Bruce Babbitt observed when he and Chairman Rahall marked the 19th Anniversary of SMCRA in West Virginia in 1996 (see attachment "I"). On August 3, 1996, then Secretary of Interior Bruce Babbitt visited a reclaimed mountain top mining operation with valley fills in Boone County, West Virginia and observed, among other things, "the landscape is better in many ways". If former Secretary Babbitt was to return to the this site or any site in any of the Appalachian states he would be even more impressed today with the resiliency of SMCRA and the tremendous achievement of the miners and operators, all of whom are "practicing environmentalists".

Mr. Chairman, your attention and amendments in 1977 allowed this bill to be passed because those changes recognized the significance of coal production in the Appalachian region of this country and the need to sustain that production and protect the jobs of our people. Your amendments relevant to this Act and the Clean Water Act that have been passed since 1977 were also important to that sustainment and protection. Your continued leadership is equally important today to be sure those same protections are in place for the operations and the miners of Appalachia. You and your Committee's vision, as demonstrated 30 years ago, is critical today to eliminate the "redundant overlap" between Congressional intent as expressed in SMCRA and the Clean Water Act.

This "overlap" dilemma casts a long shadow over the coal industry in Appalachia, creating regulatory uncertainty that discourages new and continued investment in the very region that serves as the basis for the country's industrial and electrical fuel supply. Perhaps most disturbing, it questions the future of our more than 54,000 coal miners, our "practicing environmentalists", who continue to work, live and raise their families in their native Appalachia. Those workers are threatened

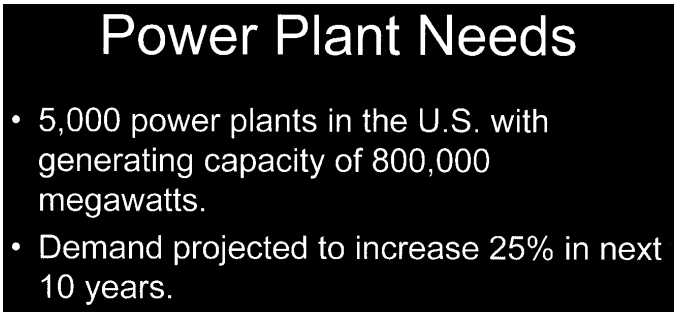
by these frivolous lawsuits and continued attacks. (See attachment "J", affidavits filed by four coal miners in a related court case).

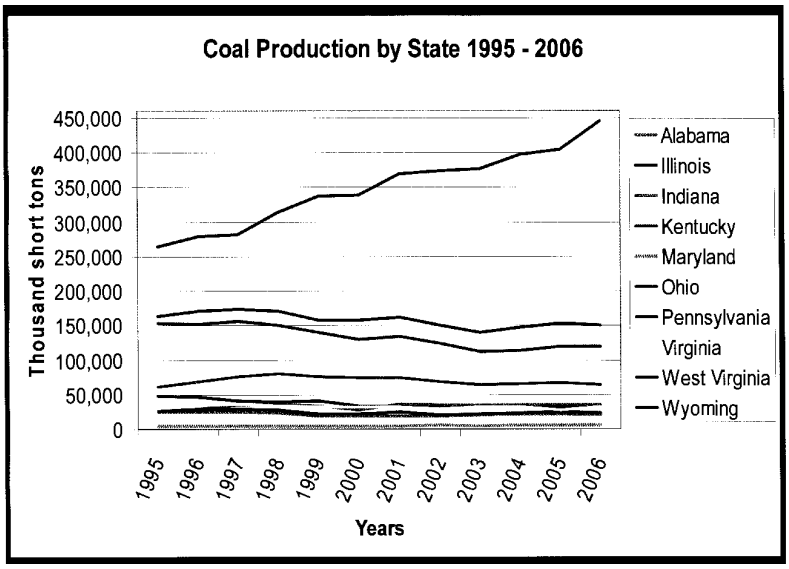
Mr. Chairman and members of the Committee, we believe that these miners are owed a stable future as they work to provide the energy for the rest of the country. As we stated previously, SMCRA was a critically important step in providing that stable future. It established that federal baseline, that brace of regulation that leveled the playing field among the coal producing states. It provided protection for the natural and social environmental, allowing the diverse environmental setting of Appalachia to maintain and flourish. SMCRA protects our communities and our people, preserving the social fabric of the Appalachian coal mining communities where our coal miners live and work. But, there is still some work to be done. Removing the judicially-inspired regulatory confusion that flourishes because of these "redundant overlaps" between SMCRA and section 404 of the Clean Water Act will firmly reestablish Appalachia as a source of domestic, industrial and consumer energy, allowing our miners, our practicing environmentalists, to continue to work and live uninterrupted as they mine the coal which not only powers the economic engines of this country, but provides the revenue stream for the AML program and is the economic lifeline for our seven Appalachian states.

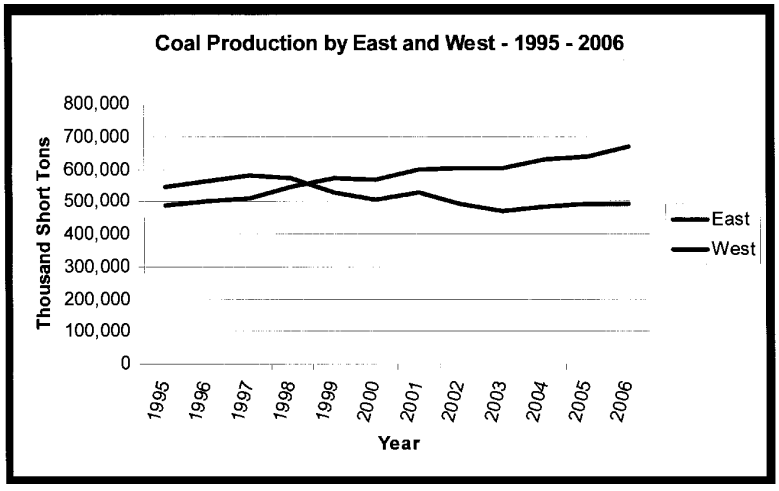
Mr. Chairman, once again, I express our appreciation for the opportunity to appear before your Committee. You set the stage 30 years ago and have diligently protected our people and their jobs ever since then. We are, however, threatened today. Our people are threatened. We turn to you, as we did in 1977, to protect us and bring peace of mind to the miners and companies in the coalfields of Alabama, Kentucky, Maryland, Ohio, Pennsylvania, Virginia and West Virginia, the proud states of America's Appalachian basin.

ATTACHMENT "A"

OVERVIEW OF EASTERN COAL 2007




Coal Production by State 1995 - 2006
Thousand short tons
450,000
400,000
350,000
300,000
250,000
200,000
150,000
100,000
50,000
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
Years
Alabama
Illinois
Indiana
Kentucky
Maryland
Ohio
Pennsylvania
Virginia
West Virginia
Wyoming


Coal Production by East and West - 1995 - 2006
Thousand Short Tons
800,000
700,000
600,000
500,000
400,000
300,000
200,000
100,000
0
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
Year
East
West

Production Overview January 1 through June 9
(thousand short tons)

	Year-to-Date			52 Weeks Ended		
	6/9/2007	6/9/2006	Percent Change	6/9/2007	6/10/2006	Percent Change
Alabama	8,982	9,104	-1.3	18,898	20,243	-6.6
Illinois	15,713	14,215	10.5	33,665	31,277	7.6
Indiana	15,826	15,820	0	35,725	34,965	2.2
Kentucky	51,625	55,430	-6.9	116,476	121,463	-4.1
Maryland	1,587	2,525	-37.2	4,114	5,310	-22.5
Ohio	10,170	10,377	-2.0	22,501	24,187	-7.0
Pennsylvania	29,168	30,644	-4.8	64,590	67,961	-5.0
Virginia	12,739	13,589	-6.3	28,997	28,810	0.6
West Virginia	68,478	70,161	-2.4	150,094	154,558	-2.9
Wyoming	192,497	192,856	-0.2	445,268	418,523	6.4
East	217,126	224,825	-3.4	481,532	495,551	-2.8
West	284,148	290,629	-2.2	664,070	647,926	2.5

Source: US Energy Information Administration

EMPLOYEES

Avg. Number of Employees - 2005

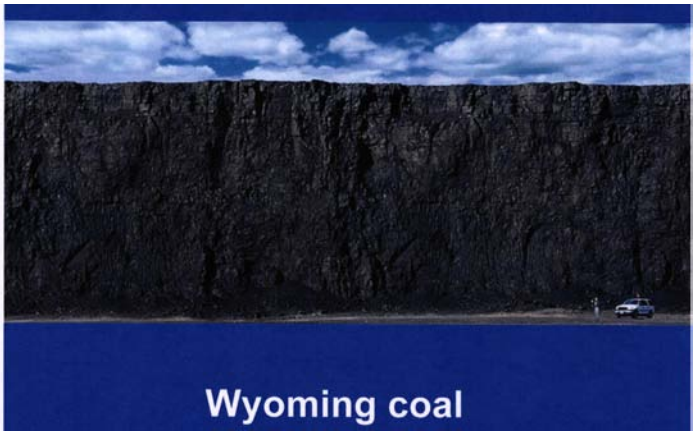
State	Union	Non-union	Total	% Union
Alabama	2,893	1,235	**4,128**	**70**
Illinois	1,689	2,128	**3,817**	**44**
Indiana		2,683	**2,683**	**0**
Kentucky	808	15,918	**16,726**	**5**
Maryland		490	**490**	**0**
Ohio	556	1,917	**2,473**	**22**
Pennsylvania	2,683	4,679	**7,362**	**36**
Virginia	726	4,280	**5,006**	**15**
West Virginia	5,850	12,651	**18,501**	**32**
Wyoming	559	4,487	**5,046**	**11**
Appalachian Total	12,925	39,704	**52,629**	**25**
Illinois Basin	2,280	6,919	**9,199**	**25**
East	15,205	46,816	**62,021**	**25**
West	6,341	9,935	**16,276**	**39**
US Total	21,546	56,751	**78,297**	**28**

Coal Reserves - 2005	
State	Reserves Base
Alabama	4,205,000,000
Illinois	104,469,000,000
Indiana	9,483,000,000
Kentucky	30,020,000,000
Maryland	643,000,000
Ohio	23,300,000,000
Pennsylvania	27,472,000,000
Virginia	1,693,000,000
West Virginia	32,960,000,000
Wyoming	63,819,000,000
East Total	235,162,000,000
West Total	257,773,000,000

Fact Summary			
Production			% of Total
East	490,414		42.3
West	667,754		57.7
Employees			
East	62,021		79.2
West	16,276		20.8
Reserves			
East	235.2	Billion	47.7
West	257.8	Billion	52.3

Market forces on eastern coal

- Declining coal prices
- Federal/state safety legislation
- Federal/state safety regulations
- Federal/state environmental legislation
- Federal/state environmental regulation
- Litigation
- Imports (36.2 million tons)
- Production expenses
  - fuel, steel, rubber tires, permitting delays
- Competition from Powder River Basin



RESEARCH NEEDS

- Safety
- Production
- Thin seam mining
- Environmental
- Carbon Capture

CONGRESSIONAL ACTION NEEDED

- Research needs
- Coal-tp-liquids incentives
- Greenhouse gas policies

ATTACHMENT "B"

SUSTAINING EASTERN COAL PRODUCTION

The Coal Industry is well poised to capitalize on the high growth opportunities as the country pursues energy independence and economic wealth from a strong domestic energy industry.

On balance, the industry has great capacity, committed management teams, aggressive business plans and a strong will to succeed. Consequently, from a big picture or macro view, the industry is well situated to meet the demands of tomorrow but not without major challenges. Global climate change, national energy policy and the coal-to-liquids program are at the forefront of these challenges and coal's future depends largely on the manner in which these policy questions are answered.

From a regional standpoint, particularly the east and mid-west portions of the country, where overall market share has fallen in recent years, we have additional, unique challenges—some technological, some political—which must be overcome if we are to remain viable and retain our place in domestic and world energy markets.

It has been widely reported that the eastern region is particularly confronted with labor shortages, ongoing environmental challenges, a diminishing reserve base and overall tougher geology. Geology that requires deeper, more difficult and more expensive mining with thinner seams and lower recovery ratios. The future of the coal industry in the states east of the Mississippi River will depend on how these issues are addressed.

Operating in today's highly competitive global markets, where contracts are won and lost on pennies per ton, additional cost burdens are a tremendous obstacle to overcome. The Illinois and Appalachian basins are blessed with the highest quality coal in the world, mined by the world's best coal miners, with technology second to none. The region has nearly one-half (47.7%) of this nation's mineable reserves remaining with all the ingredients to succeed for the next 200 years, but we are threatened!

- On April 19, 2007, the New York investment firm, Stifel, Nicolaus & Co., Inc., observed: "...We expect total Appalachian volumes to fall from 390 million tons in 2006 to 354 million tons in 2008...We expect increased coal production from the western U.S. (+44 million tons 2006 to 2008), imports, and other U.S. regions to offset the Appalachian declines and allow for some growth in demand."...
- Central Appalachian coal production has been inelastic and resistant to price triggers during the rally of 2004, with mining companies straining to make the most of depleting reserves at existing sites and constrained from developing

new mines by permitting delays.... Nowhere is this more true currently than in West Virginia. (Coal Daily—3/4/05)

We are threatened and we need your help to sustain our production for tomorrow. With the threat of increased pressures from foreign and western coal, we must "tool-up" to meet the demands of today's market..

Production and Demand

National energy demand is on the rise. Increasing oil prices and a national desire to decrease American dependence on foreign oil have brought coal to the forefront of energy production. We hope the strong market will continue, but history and world turmoil brings a sense of unpredictability. To prepare for this uncertainty we need to encourage investment to be sure we are ready to competitively meet the world's demands.

Installing and expanding modern, "state-of-the-art" capital projects today will help alleviate the negative pressures of an unpredictable regulatory atmosphere that is more restrictive than any other nation and geologic conditions that are ever more challenging that puts the Appalachian coal industry at a competitive disadvantage.

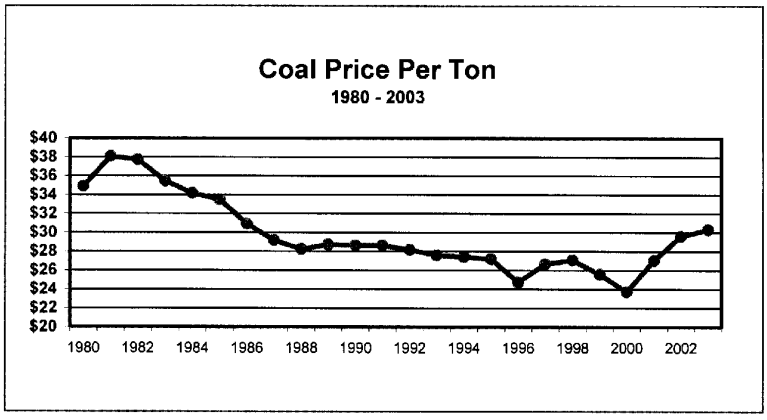
For the last several years, the United States has produced and consumed more than one billion tons of coal. That level of national consumption is predicted to continue. Eastern coal contributes 40% to the nation's needs, down from 55% ten years ago.

- Production next year will probably equate to 1.15 billion tons, an increase of over 4% over the 2004 levels. The National Mining Association expects that the bulk of this total, some 650 million tons will come from Western production. Permitting problems are a factor in constraining production in Central Appalachia... (Coal News, December 2004)
- According to the Energy Information Administration (EIA), total U.S. production is 2.1% less than last year. However, production west of the Mississippi River is 1.7% more than last year while production east of the Mississippi is 7.1% less.
- For the month of February "07, imported coal exceeded exported coal. 2.656M tons imported versus 2.649M tons exported. Although year-to-date "07 (January "07 and February "07) totals indicate more exported than imported (6.955M tons exported v. 5.501M tons imported) the trend is concerning since eastern production accounts for the majority of exported coal in the US.

COAL PRICES

- Since Q404, the price of Appalachian steam coal has dropped from $62-$64 per ton to a price in Q107 of $38-$40 per ton (based on NYMEX pricing of 12,500 BTU <1%S coal).

As evidenced above coal prices from the Appalachian Basin have been falling rapidly over the past two years. In fact, notwithstanding the past couple of years, coal prices were on a downward spiral for years amidst increasingly competitive markets which effectively inhibited the development of the infrastructure needed to take full advantage of the current demand for coal.



MINING DIFFICULTIES THAT THREATEN EASTERN PRODUCTION

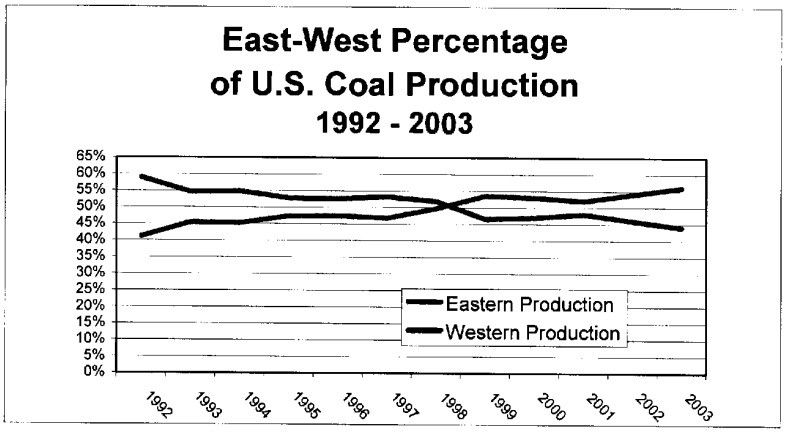
- Today's Appalachian coal seams are more difficult to access, require more sophisticated preparation and are further from the transportation points of rail and barge. Developing infrastructure, i.e., shafts, slopes, rail sidings and loading facilities, today will help the coal "flow" tomorrow.
- Mining costs, i.e., fuel, engineering, permitting and reclamation, personnel, equipment and supplies have all turned sharply upward. As always, the costs increase when prices increase, but the costs do not decrease when the prices drop!
- The entire industry is facing the problems of an aging workforce and an overall shortage of workers. It is, however, most critical for our region since 79.2% of the miners are working in the eastern and mid-western coal industry. Human infrastructure must be developed today.
- Legal challenges and continuing unpredictability in the permitting process have further inhibited the ability of the industry to maximize its production opportunities. Acknowledgement of advancements in applied technology and environmental expertise are immediately needed.

We need help in addressing these challenges and uncertainty. We must take full advantage of today's "optimistic atmosphere." It is an "once-in-a-lifetime" opportunity!

Domestic Competition

Aside from severe competition from countries that do not have the environmental, health and safety standards of the U.S. industry, we must also compete with coal from western states with more inviting geology. For instance, in Wyoming, the coal seams can be greater than 80 feet in thickness while the typical seams found in eastern mines average from 3 to 6 feet thick.

- Output from the PRB has continued to make inroads into regions traditionally supplied by Central Appalachian, Illinois Basin or other origins, with the low-sulfur product in demand from fuel buyers facing increasing environmental regulation. (Coal Daily—3/4/05)



It is a tribute to the quality of Appalachia and Illinois Basin coals, to the expertise of its workers and to the efficiencies of its industry that this region has been able to maintain its production of 42.3% of this nation's coal That requires proper equipment, skilled manpower, modern infrastructure, and a stable, predictable regulatory climate. The use western coal in our traditional eastern is increasing.

- A West Virginia utility is taking steps to blend western coal with its traditional fuel mix. (State Journal—3/11-17/05)

It is critical to maintain market share if the eastern states are to continue to share in the economic prosperity of the U.S. coal industry. To do this, we must have regulatory predictability, a fair level of regulatory controls with achievable standards and an aggressive program to encourage future development. This is the ideal time for the federal government to encourage the "re-tooling" and expansion of the Appalachian industry's infrastructure to take advantage of the tremendous opportunity offered by current energy market demands.

Frankly, many say there is not enough coal being mined in this country to supply its needs! However, that demand is so price sensitive that the attractiveness of western coal, where the seams are thick and mining costs are low, will overwhelm the higher cost Appalachian coals, found east of the Mississippi River. Without immediate attention to the challenges facing our eastern and mid-western coals, imported coals, typically mined with less environmental, safety and human regulation, pose the same threat. So, yes, it may be true that there is not enough American coal being mined to supply America's needs, but you may be certain that the coal will be found from some source, someplace. We want to maintain our market share!

Governmental Actions

It cannot be emphasized too strongly that the actions of government have a very real statistical impact on coal production. Yearly production totals can be charted with the implementation of major government regulatory acts.

History indicates that each significant action of government was accompanied by an immediate and negative effect on production. However, the reverse can also be true. That is, positive governmental encouragement will likely result in the capital investment necessary to sustain future production at or above current levels.

Partnership

Given that coal production from the states east of the Mississippi River makes up a significant portion of overall domestic energy production (42.3%), it is incumbent on State and federal governments and the coal industry to act in partnership to ensure the continued economic viability of our industry In the Appalachian region. We must be competitive and prepared for the uncertainty of tomorrow. We need your help if the eastern states are to remain competitive.

We have a "once in a lifetime" opportunity for the eastern coal industry. In these times of a robust energy market with strong pricing, we must raise the confidence of all companies to invest in this region.

Recommendations:

1. Increase Congressional funding for coal extraction research.
2. Continue funding for miner training programs.

Attachment "C"

shall pe ... regulatory authority
ing con is—
gineer ordance with § 816.
enced i d nonacid for g;
rock fi

(1) Such inspections shall be made at least quarterly throughout construction and during critical construction periods. Critical construction periods shall include at a minimum:

(i) Foundation preparation, including the removal of all organic material and topsoil; (ii) placement of underdrains and protective filter systems; (iii) installation of final surface drainage systems; and (iv) the final grading and revegetated fill. Regular inspections by the engineer or specialist shall also be conducted during placement and compaction of fill materials.

(2) The qualified registered professional engineer shall provide a certified report to the regulatory authority promptly after each inspection that the fill has been constructed and maintained as designed and in accordance with the approved plan and this chapter. The report shall include appearances of instability, structural weakness, and other hazardous conditions.

(3)(i) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase shall be certified separately.

(ii) Where excess durable rock spoil is placed in single or multiple lifts such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, in accordance with § 816.73, color photographs shall be taken of the underdrain as the underdrain system is being formed.

(iii) The photographs accompanying each certified report shall be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(4) A copy of each inspection report shall be retained at or near the mine site.

(i) *Coal mine waste.* Coal mine waste may be disposed of in excess spoil fills characteristics to be consistent with the design stability of the fill.

(j) *Underground disposal.* Excess spoil may be disposed of in underground mine workings but only in accordance with a plan approved by the regulatory authority and MSHA under § 784.25 of this chapter.

[48 FR 32925, July 19, 1983, as amended at 48 FR 44780, Sept. 30, 1983]

§ 816.72 Disposal of excess spoil: Valley fills/head-of-hollow fills.

Valley fills and head-of-hollow fills shall meet the requirements of § 816.71 and the additional requirements of this section.

(a) *Drainage control.* (1) The top surface of the completed fill shall be graded such that the final slope after settlement will be toward properly designed drainage channels. Uncontrolled surface drainage may not be directed over the outslope of the fill.

(2) Runoff from areas above the fill and runoff from the surface of the fill shall be diverted into stabilized diversion channels designed to meet the requirements of § 816.43 and, in addition, to safely pass the runoff from a 100-year, 6-hour precipitation event.

(b) *Rock-core chimney drains.* A rock-core chimney drain may be used in a head-of-hollow fill, instead of the underdrain and surface diversion system normally required, as long as the fill is not located in an area containing intermittent or perennial streams. A rock-core chimney drain may be used in a valley fill if the fill does not exceed 250,000 cubic yards of material and upstream drainage is diverted around the fill. The alternative rock-core chimney drain system shall be incorporated into the design and construction of the fill as follows.

(1) The fill shall have, along the vertical projection of the main buried stream channel or rill, a vertical core of durable rock at least 16 feet thick which shall extend from the toe of the fill to the head of the fill, and from the base of the fill to the surface of the fill.

A system of lateral rock underdrains shall connect this rock core to each area of potential drainage or seepage in the disposal area. The underdrain system and rock core shall be designed to carry the anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area. Rocks used in the rock core and underdrains shall meet the requirements of § 816.71(f).

(2) A filter system to ensure the proper long-term functioning of the rock core shall be designed and constucted using current, prudent engineering practices.

(3) Grading may drain surface water away from the outslope of the fill and toward the rock core. In no case, however, may intermittent or perennial streams be diverted into the rock core. The maximum slope of the top of the fill shall be 33h:1v (3 percent). A drainage pocket may be maintained at the head of the fill during and after construction, to intercept surface runoff and discharge the runoff through or over the rock drain, if stability of the fill is not impaired. In no case shall this pocket or sump have a potential capacity for impounding more than 10,000 cubic feet of water. Terraces on the fill shall be graded with a 3 to 5 percent grade toward the fill and a 1 percent slope toward the rock core.

[48 FR 32926, July 19, 1983]

§ 816.73 Disposal of excess spoil: Durable rock fills.

The regulatory authority may approve the alternative method of disposal of excess durable rock spoil by gravity placement in single or multiple lifts, provided the following conditions are met:

(a) Except as provided in this section, the requirements of § 816.71 are met.

(b) The excess spoil consists of at least 80 percent, by volume, durable, nonacid- and nontoxic-forming rock (*e.g.*, sandstone or limestone) that does not slake in water and will not degrade to soil material. Where used, noncemented clay shale, clay spoil, soil or other nondurable excess spoil materials shall be mixed with excess durable rock spoil in a controlled manner such that no more than 20 percent of the fill volume, as determined by tests performed by a registered engineer and approved by the regulatory authority, is not durable rock.

(c) A qualified registered professional engineer certifies that the design will ensure the stability of the fill and meet all other applicable requirements.

(d) The fill is designed to attain a minimum long-term static safety factor of 1.5, and an earthquake safety factor of 1.1.

(e) The underdrain system may be constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, provided the resulting underdrain system is capable of carrying anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the foundation of the disposal area and the other requirements for drainage control are met.

(f) Surface water runoff from areas adjacent to and above the fill is not allowed to flow onto the fill and is diverted into stabilized diversion channels designed to meet the requirements of § 816.43 and to safely pass the runoff from a 100-year, 6-hour precipitation event.

[48 FR 32926, July 19, 1983, as amended at 48 FR 44780, Sept. 30, 1983]

§ 816.74 Disposal of excess spoil: Preexisting benches.

(a) The regulatory authority may approve the disposal of excess spoil through placement on a preexisting bench if the affected portion of the preexisting bench is permitted and the standards set forth in §§ 816.102(c), (e) through (h), and (j), and the requirements of this section are met.

(b) All vegetation and organic materials shall be removed from the affected portion of the preexisting bench prior to placement of the excess spoil. Any available topsoil on the bench shall be removed, stored and redistributed in accordance with § 816.22 of this part. Substitute or supplemental materials may be used in accordance with § 816.22(b) of this part.

(c) The fill shall be designed and constructed using current, prudent engineering practices. The design will be certified by a registered professional engineer. The spoil shall be placed on

Attachment "D"

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KENTUCKIANS FOR THE COMMONWEALTH, INCORPORATED,
Plaintiff-Appellee,

v.

JOHN RIVENBURGH, Colonel, District Engineer, U. S. Army Corps of Engineers, Huntington District; ROBERT B. FLOWERS, Lieutenant General, Chief of Engineers and Commander of the U. S. Army Corps of Engineers; GINGER MULLINS, Chief of the Regulatory Branch, Operations and Readiness Division, U. S. Army Corps of Engineers, Huntington District,
Defendants-Appellants,

and

POCAHONTAS DEVELOPMENT CORPORATION; HORIZON NR, LLC; KENTUCKY COAL ASSOCIATION,
Intervenors/Defendants.

INTERSTATE MINING COMPACT COMMISSION,
Amicus Supporting Appellants.

No. 02-1736

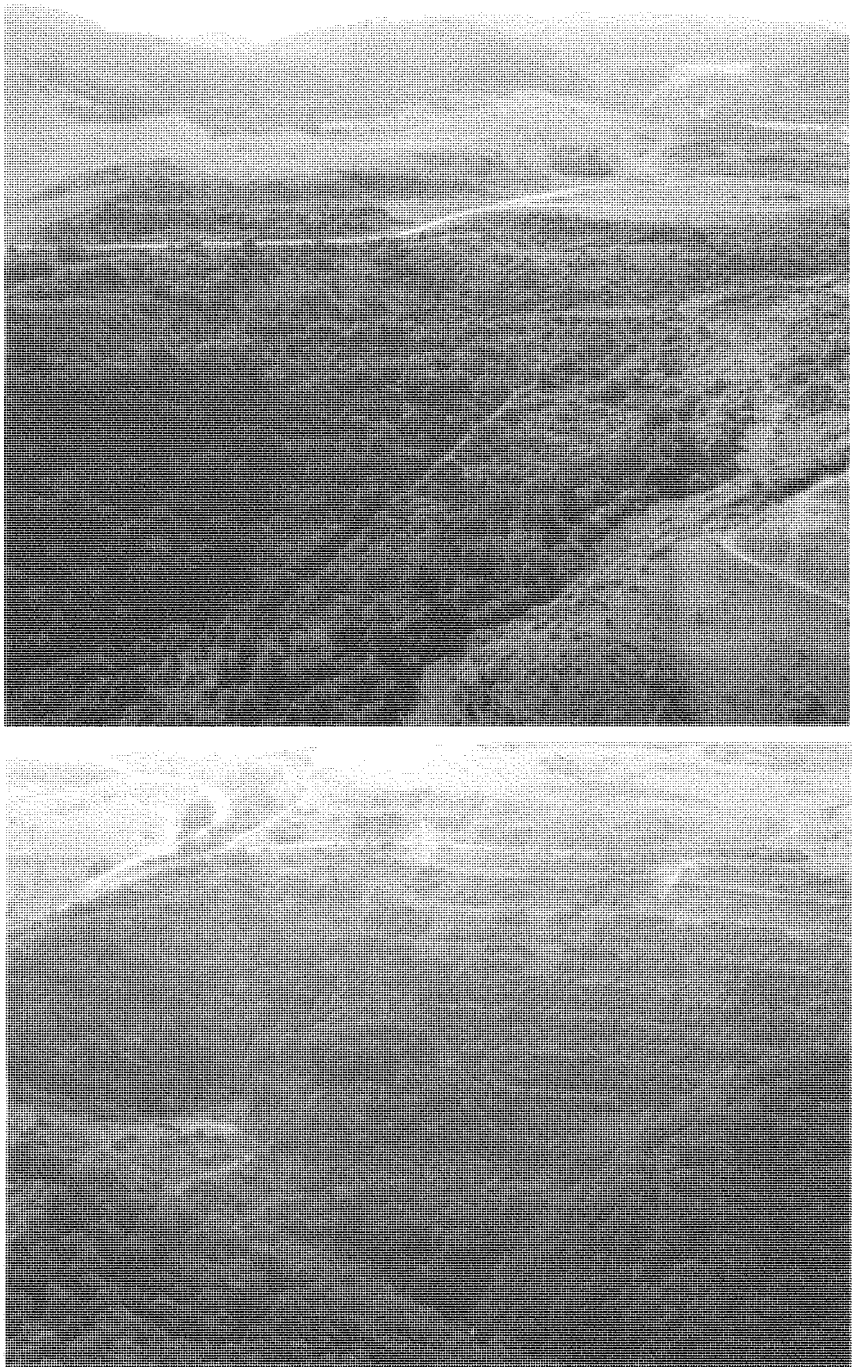
operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable," implying the placement of fill in the waters of the United States. 30 U.S.C. § 1265(b)(24). It is apparent that SMCRA anticipates the possibility that excess spoil material could and would be placed in waters of the United States, and this fact cannot be juxtaposed with § 404 of the Clean Water Act to provide a clear intent to limit the term "fill material" to material deposited for a beneficial primary purpose.

The district court also resorted to the legislative history of the Clean Water Act, but this history does not demonstrate a clear congressional intent to limit "fill material" to material deposited for a beneficial primary purpose. The court's canvass of statements by legislators concludes merely that the sole concern of Section 404 was dredged spoil, and "Section 404 was enacted to allow harbor dredging and dredged spoil disposal to continue expeditiously under the then-existing dredge and fill permit program administered by the Corps." The focus of the court's description of the legislative history is only on dredged spoil, not on the meaning of the additional term "fill material," on which the legislative history appears inconclusive.

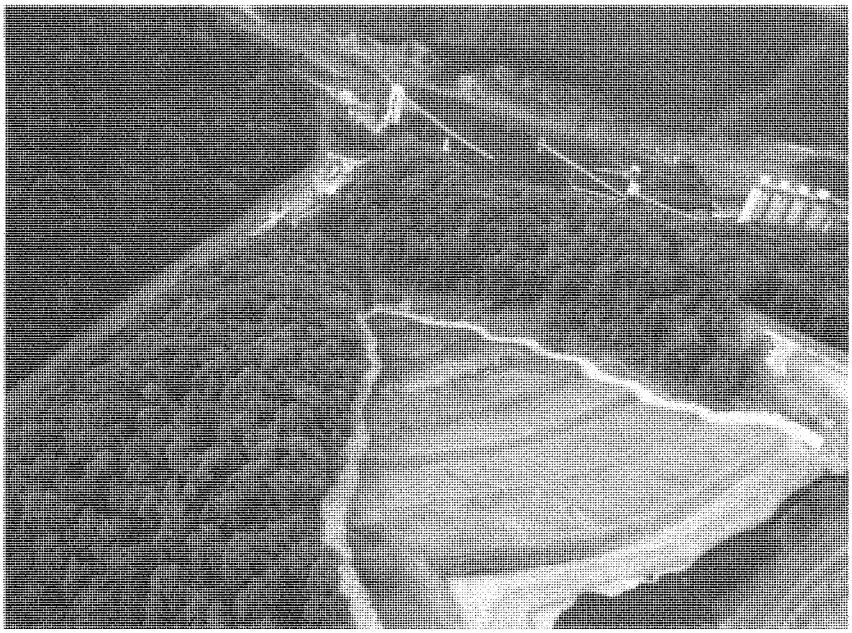
Finally, the district court relied on "longstanding regulatory interpretation" by the EPA and the Corps. This reliance was entirely inappropriate to the court's analysis under *Chevron* step one. The focus of step one of *Chevron* analysis is "whether *Congress* has directly spoken to the precise question at issue," making its intent clear. *Chevron*, 467 U.S. at 842 (emphasis added). Agency interpretations of statutory provisions only come into play if Congress has not spoken clearly. Relying on *agency* interpretations as evidence of a clear *congressional* intent is therefore misguided.

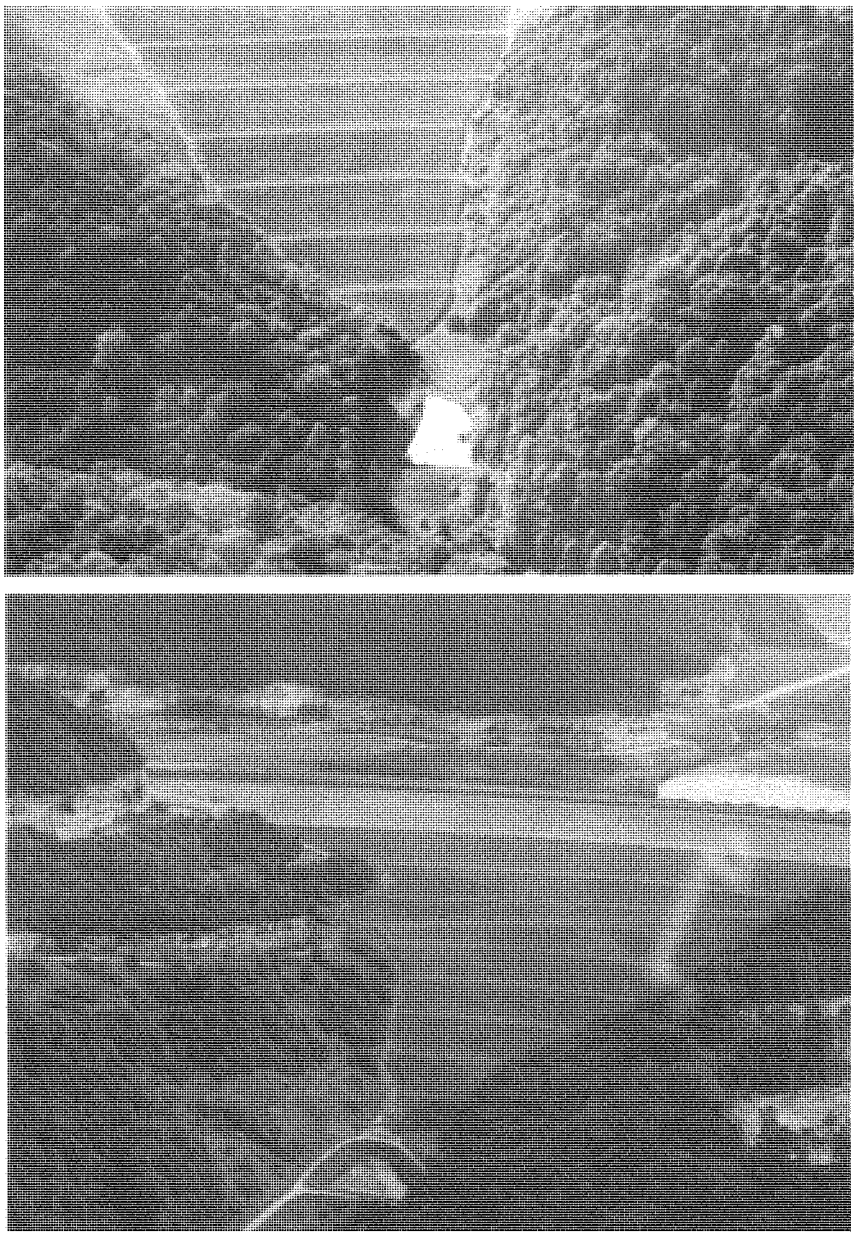
The district court's application of traditional tools of statutory construction thus could not leave it with a clear congressional intent that the undefined term "fill material" as used in § 404 means material deposited for a beneficial primary purpose. Indeed, the lack of clarity in the term itself prompted the agencies to undertake efforts to develop the term's meaning from the context of the permit programs and the interrelationship between § 402 permits and § 404 permits. While the statute authorizes the EPA to issue permits "for the discharge of any pollutant," defining "pollutant" to include "rock, sand,

Attachment "E"



Attachment "F"





Attachment "G"

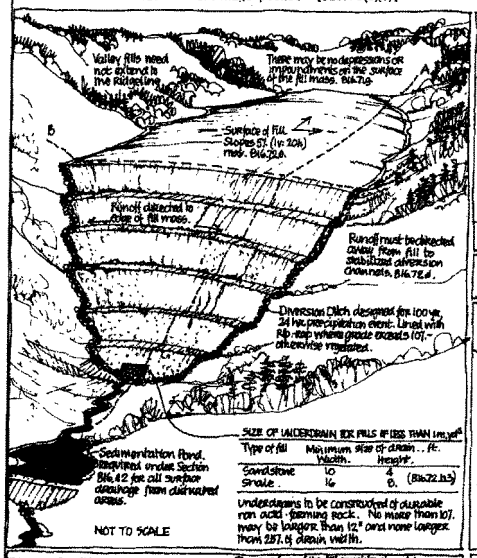
DISCUSSION & DESIGN GUIDELINES (CONTINUED)

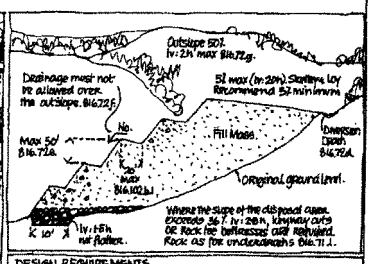
Table 1
Minimum Dimensions of Underdrain

Type of Fill	Minimum Size of Drain (feet) Width	Height
Sand Stone	10	4
Shale	16	8

Note - these dimensions are the same in the case of shale as Skelly and Loy's recommendations (1). Section 816.71(g) permits no depressions or impoundments on the fill mass. However, an exception is made for Head-of-Hollow fills. A "drainage pocket" [816.73(e)(3)] is allowed at the head of the fill to intercept runoff and discharge it through or over the rock chimney drain. Skelly and Loy's report notes that surge ponds located at the head of the rock core in West Virginia's fills, though not intended to retain the water, did so with resultant instability problems when water saturated the fill.

The design criteria for the fill mass as shown in Figure 1 apply both to Valley and Head-of-Hollow fills. But in the case of Head-of-Hollow fills, which must completely fill the disposal site to the elevation of the ridge line, the surface drainage of the fill may be directed inwards to a rock chimney drain as shown in Figure 2 [816.73(a)].





DESIGN REQUIREMENTS FOR VALLEY FILLS Section AA'
NOT TO SCALE

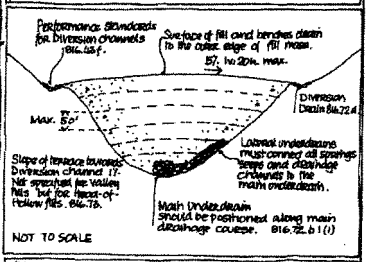


Figure 1 DESIGN REQUIREMENTS FOR VALLEY FILLS. Section 816.72.

The surface of the fill must be sloped towards the edges where runoff is collected in protected diversion channels. Terraces must also direct water off the fill to these channels.

DESIGN REQUIREMENTS FOR VALLEY FILLS. Section BB'

Skelley and Loy Recommend that diversion ditches are located on undisturbed ground & rip-rapped.

IV. PLACEMENT

The Regulations require that placement is carried out in such a way as to ensure a long-term static safety factor of 1.5. The requirement that spoil be placed in horizontal lifts of 4 feet or less [816.72(c)] and concurrently compacted makes the placement procedure as used previously in Kentucky unacceptable. Dumping spoil over the outslope of a fill tends to result in the segregation of fill, the large coarse materials at the bottom forming a "natural" French drain system. The requirement that spoil be placed in horizontal lifts of 4 feet or less and concurrently compacted prevents formation of a natural under-drainage system but the increased stability which results from controlled placement and compaction usually outweighs this disadvantage. Placement of spoil in 4-feet lifts was already required by West Virginia law. During the placement process the fill must be inspected at quarterly intervals at least and at certain stages, by a registered engineer or a professional who must submit a certified report. Operators are not permitted to dispose of coal processing waste in Head-of-Hollow or Valley fills.

V. REVEGETATION

Each lift of both Valley and Head-of-Hollow fills should be vegetated immediately upon completion. This was not feasible with the method previously used in Kentucky, and it is an advantage of placing spoil in horizontal lifts that revegetation can be carried out

Attachment "H"

Vol. 44—No. 50
3-13-79
BOOK 2:
PAGES
14901-15309

federal register

BOOK 2 OF 3 BOOKS
TUESDAY, MARCH 13, 1979
PART II

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

SURFACE COAL MINING AND RECLAMATION OPERATIONS

Permanent Regulatory Program

ended, implying that other measures not listed may be required. To assure flexibility and promote the development of innovative control techniques, the Office has decided to retain the aspect of the regulation which implies that other unlisted sediment control measures can be implemented.

5. Comments suggested substituting the word "stabilizing" for "shaping" in Section 816.46(b)(3). The rationale for this change was that shaping was only one of several stabilizing techniques used for erosion control. The commenters felt that shaping might be incompatible with the approximate original contour requirement. The Office has decided to adopt this recommendation. Stabilizing mechanical and vegetative techniques are only two of many methods which can be used to reduce the rate and volume of sediment transport.

6. One commenter said "treating with chemicals" should be reworded to say "utilization of flocculating agents." The Office has decided that the term chemicals is broad enough to include not only the specific polyelectrolytes, but could also include such other chemicals as lime or alum that could possibly be used to increase floc size and which may at the same time improve other water quality parameters.

7. One editorial change was made to clarify the intent of the regulation within the context of the law. In Section 816.46(b)(3), "prompt" revegetation was replaced with "timely" revegetation in accordance with Section 816.111(b). The purpose of this change was to stimulate the operator to take swift measures in re-establishing the vegetative cover.

§ 816.46 Sedimentation ponds.

§ 816.46(a)

General requirments. The Office has decided to require sedimentation ponds in conjunction with other sediment control measures as "best technology currently available" to prevent to the extent possible additional contributions of suspended solids to streamflow or runoff outside the permit area and to achieve and maintain applicable effluent limitations.

Sedimentation ponds are structures, including barrier dams or excavated depressions, which slow down water runoff to allow sediment to settle out. To effectively settle particles, sedimentation ponds must provide sufficient storage volume for both sediment and detained water. In addition to providing adequate storage volume, ponds must detain water for a sufficient time to allow sediment to settle out.

It is well established that sedimentation ponds used with other sediment control measures are "state-of-the-art" for controlling sediment movement from surface coal mining operations. The Environmental Protection Agency (EPA) has undertaken a number of studies to determine the best methods for controlling sediment laden flow. EPA studies have concluded that sedimentation ponds are the key to controlling sediment. According to EPA, such ponds are "the most effective structures for trapping sediment." The conventional method for controlling sediment that reaches the periphery of the mining operations is through the construction of a sediment pond to intercept the surface runoff before it leaves the mining site. *Erosion and Sediment Control—Surface Mining in the Eastern United States, at 65 (1976).* Another EPA study indicates sedimentation ponds can be considered as the last opportunity to treat the runoff before the water leaves the mine area. Hill, *Sedimentation Ponds—A Critical Review,* at 2 (Oct. 1976). According to one of the leading commentators in the field, sediment ponds should be located as close to the sediment source as possible and before drainageways reach the main stream. *Grim and Hill, Environmental Protection in Surface Mining of Coal, EPA-670/2-74-093;* at 103 (Oct. 1974).

Also, several states, including West Virginia, Pennsylvania, Kentucky and Montana now require sediment ponds to control sediment from mining operations. Hill, at 13 (1977).

The mechanics of sediment laden flow are complex. The major factors governing the efficiency of a sediment pond are the geometry of the basin, the inflow hydrograph, the inflow sediment graph, the outlet design, the flow pattern within the basin, the characteristics of the sediment and the settling behavior of the suspended sediment particles, the detention time, and, where applicable, control devices within the basin which minimize short-circuiting, turbulence, and resuspension. Ward, *Simulation of the Sedimentology of Sediment Detention Basins at 32 (1977).*

The final sedimentation pond design criteria are supported by Sections 102, 201(c), 501(b), 503 (a) and (b), 515(b)(10), 515(b)(24) and 516 of the Act. See also *Surface Mining Regulation Litigation,* 456 F. Supp. 1301 (D.D.C. 1978).

The Office has considered alternatives analyzed in the regulatory analysis. The rationale for selecting the final regulations in lieu of the alternatives is found in the context of this preamble discussion, the disposition of submitted comments related to the final regulations and the preamble to the proposed regulations for the permanent program.

The final design criteria for sedimentation ponds contain the following key requirements. Sedimentation ponds may be used individually or in series. Especially in mountainous areas, several small ponds may be more desirable than a single large pond because of topographic constraints. Several small ponds may also improve overall detention time. Moreover, one small pond can be used to remove the bulk of the large particles thus reducing the need to clean out a larger polishing pond. Hill, at 14 (1977); *Erosion and Sediment Control* at 54 (1976).

Sedimentation ponds must be constructed prior to any disturbance of the area to be drained into the pond and as near as possible to the area to be disturbed. Grim and Hill at 103 (1974). Generally, such structures should be located out of perennial streams to facilitate the clearing, removal and abandonment of the pond. Further, locating ponds out of perennial streams avoids the potential that flooding will wash away the pond. However, under design conditions, ponds may be constructed in perennial streams without harm to public safety or the environment. Therefore, the final regulations authorize the regulatory authority to approve construction of ponds in perennial streams on a site specific basis to take into account topographic factors. Hill at 11 (1976); *Erosion and Sediment Control* at 54 (1976).

In general, various subsections of the regulations dealing with sedimentation ponds require the operator to demonstrate how elected options will meet design criteria. Several commenters desired clarification as to how this could be accomplished. The operators have the burden of providing adequate assurance or proof that the methods proposed are effective and safe. Such proof can be presented for approval by the regulatory authority in many different forms, and is not specified in any specific format. Except as specified in the regulations, such forms may generally include but are not limited to the following:

a. Maps, graphs, or charts.

b. Valid reports of similar work performed by others.

c. Testimony by recognized professionals, or

d. Actual laboratory experiments, and controlled field plot demonstrations.

The operator has the option of electing the most advantageous method. Final approval is still vested in the regulatory authority.

The following general comments were received on Section 816.46(a).

Commenters requested insertion of words in this section to point out the exemption from the requirement to

construct ponds in order to track Section 816.42. Such insertions as "if necessary," or "as required" were suggested.

This issue has been previously addressed in the context of whether sediment ponds are "best technology currently available." Operators will find that sedimentation ponds can be used to their benefit to reduce sediment and achieve effluent limitations. The insertion of the suggested wording might expand the narrow exemption contained in Section 816.42. To avoid any possibility that the exemption would be expanded by this language addition, the Office decidrd to reject the comment.

Commenters requested clarification of the terminology "disturbance of the disturbed area" as used in the proposed regulations. Disturbance is a progressive process which can be considered as a deviation from a baseline condition. The wording has been clarified to reflect the requirement to construct a pond prior to any disturbance of the existing pre-mining condition.

Commenters suggested allowing construction of sedimentation ponds in intermittent and perennial streams. Because of the physical, topographic, or geographical constraints in steep slope mining areas, the valley floor is often the only possible location for a sediment pond. Since the valleys are steep and quite narrow, dams must be high [illegible] must be continuous across the entire valley in order to secure the necessary storage.

There are two other alternatives. One would be to use an area to one side of the stream for the pond. This will not be physically possible in most cases, and if pursued, might cause serious additional disturbance to the environment. Kathuria at 4 (1978).

The other alternative would be to declare the area unsuitable for mining. Each case needs to be judged on its own. The Office recognizes that mining and other forms of construction are presently undertaken in very small perennial streams. Many Soil Conservation Service (SCS) structures are also located in perennial streams. Accordingly, OSM believes these cases require thorough examination. Therefore, the regulations have been modified to permit construction of sedimentation ponds in perennial streams only with approval by the regulatory authority.

One commenter suggested that a new Section should be added for controlling sedimentation from mining on steep slopes and that the new Section should focus on performance standards with no reference to design criteria. The commenter contends that 0.1 acre-foot for each acre of disturbed area within the upstream drainage area is sufficient to control runoff and sedimentation. Also the commenter suggests the design standards would appear to eliminate bench ponds.

The commenter did not submit any data or information such as maps, contours and mine plans and drainage of their sediment ponds to substantiate the comments. Based on this suggestion alone without the submission of data, the office has no reason to believe that performance standards of the Act will be achieved and maintained.

Commenters said sediment ponds could cause degradation and scouring of some stream channels especially in areas prone to arroyo formation. The Office has decided that such downstream erosion can be mitigated. As discussed previously, sediment ponds are necessary to achieve and maintain water quality standards of the Act during surface coal mining and reclamation operations. To avoid downstream erosion or scouring, operators are free to divert streams around surface coal mining activities in accordance with Section 816.44. Moreover, downstream scouring can be minimized by locating the sediment pond out of perennial streams thus assuring that natural sediment loads remain in the stream. In addition, downstream adverse effects can be mitigated by the use of energy dissipators, riprap channels and other devices as required by Section 816.45.

§ [illegible](b) Sediment storage volume.

The [illegible] establish two methods for com[illegible]uired sediment storage volume. [illegible]erator may utilize the Universal [illegible] Equation (USLE), gully erosion [illegible] and appropriate sediment delivery ratios to compute sediment yield. This method allows the operator maximum flexibility to account for site specific variations in sediment yield. The preamble to the proposed rules 43 Fed. Reg. 41747 (Sept. 18, 1978) supporting the selection of the USLE is incorporated herein by reference.

Under the second method, operators may utilize a general rule for computing [illegible]diment yield from the disturbed area. The [illegible]erator may assume a sediment yield of [illegible]re-foot for each acre of disturbed area [illegible] regulatory authority is authorized to [illegible]ire greater sediment storage volume [illegible]ecessary. A lesser sediment storage volume to .035 acre-foot for each acre of disturbed area may be authorized if the operator demonstrates that sediment removed by other sediment control measures is equal to the reduction in the pond sediment storage volume. The preamble to the proposed rules supporting this Section is hereby incorporated by reference. 43 Fed. Reg. 41748 (Sept. 18, 1978).

The following comments were re[illegible] Section 816.46(b).

Comm[illegible]ted technical justification for the option[illegible]duct sediment ponds having accumul[illegible] sediment volume from the drainage area to the pond for a minimum of three years. Commenters submitted no data to refute the design option. However, commenters said the majority of ponds had an operational life of less than six months. Commenters added that this was not the case with sedimentation ponds serving reclaimed areas, but few of the latter category were [illegible]ired due to consistent attainment of [illegible]tions. Again, commenters failed to submit [illegible] porting this assertion.

The final regulations include a three-year minimum sediment storage volume for ponds. Operators may use the USLE to compute required sediment storage volume to capture sediment yield for a minimum three-year period. As an alternative, operators may compute sediment storage volume based upon an initial requirement of 0.1 acre-foot for each acre of disturbed area within the upstream drainage area. These two options offer operators the flexibility to include site-spe[illegible]variation in design of sediment ponds.

A three-[illegible] minimum storage volume is necessa[illegible] to collect sediment during normal pre[illegible]ing, and reclamation operations under [illegible] Act. Under prior state laws, the normal [illegible] of ponds designed for contour mines was usually from one to three years. For area mines it was usually much longer. Hill at 11 (1977). With the implementation of the Surface Mining [illegible]surface coal mining and reclama[illegible]tions will generally occur over a p[illegible]uch longer than three years. Premin[illegible] actual mining will normally occu[illegible]more than one year. Further, the [illegible]y not be removed until the disturb[illegible]as has been restored, the vegetation requirements of Section 816.111–816.117 are met, and the drainage meets applicable stream standards. Thus, a three-year minimum storage volume is not an excessive requirement.

In particular, vegetation standards require, as a minimum, vegetative cover capable of stabilizing the soil surface for erosion. Site-specific investigations in the western coal fields have shown that such stabilization [illegible] not occur within the first year or two[illegible] mining. Gullies formed on revegeta[illegible]surfaces will often increase sedime[illegible]ld. Moreover, internal drainage to [illegible] topsoil and seeded areas is possible. [illegible]away and Kimbal, Trip Report at 8, 12, 23 (1976). See also Dollhopt et al. 71–73 (1977). This type of extensive erosion after mining requires that sediment

Attachment "I"


Sunday Gazette-Mail

Landscape improved, Babbitt says

BABBITT

Hobet No. 21 was recently selected to host a ceremony commemorating the 19th anniversary of the Surface Mining Control and Reclamation Act's passage. Here's what Secretary of the Interior Bruce Babbitt had to say at the proceedings about the reclaimed lands he saw at the No. 21 mine.

"In some ways it is a better landscape than it was before. It is a more diverse landscape -- a savanna of forests coming back, of fields, of open spaces. It is probably in some ways closer to the landscape that existed here a thousand years ago -- when this countryside was kept in a savanna-like condition by fires. That's the kind of landscape -- with all its diversity and richness and water fowl and deer and big game and wildlife -- that we see here today. It's an example we ought to hold up as a rebuke to those who say 'it's jobs or the environment.' The answer this landscape shouts out is 'we can have both.' We can have a great and strong and growing economy, and we can protect our God-given natural heritage. We can live in equilibrium with the land, and we can pass the glory of this landscape on in improved form to our children."

Bruce Babbitt
U.S. Secretary of the Interior
August 3, 1996

Attachment "J"

AFFIDAVIT OF THOMAS MCLEMORE

STATE OF WEST VIRGINIA,

COUNTY OF LOGAN, To-Wit:

This day personally appeared before me, the undersigned authority, a notary public in and for the County and State aforesaid, THOMAS MCLEMORE, who, after being first duly sworn, states as follows:

1. My name is Thomas McLemore. I live at 409 Baldwin, Rt 5, Mount Gay, 25637.

2. I am employed by Apogee Coal Company, LLC at the Guyan Mine as a blaster. I am very concerned about the lawsuit regarding Apogee's North Rum Surface Mine Permit. I have one child. I am my family's main source of support.

3. I've been in mining since 1989 and this is my only source of income.

4. I have a 15-year old daughter who depends upon my income. She plans to go to college and without my income, her options would be limited.

5. I think people should try to see both sides. The media never shows both sides. I am against bad reclamation. I think people need to come and see a properly reclaimed mine. It provides sites for future businesses and for recreation.

6. There are schools, jails, prisons, and golf courses currently located on former mining sites. This land could be used to relocate the communities and businesses that are currently experiencing flooding on a regular basis.

7. I've hunted reclaimed property and undisturbed lands and there is more wildlife on reclaimed properties.

8. More than just the employees of the mining industry depend on mining. Hydraulic shops, stores, and restaurants are just some of the businesses that depend on mining.

9. I had to leave the state in 1998 over permit issues and I don't want to leave again.

AND FURTHER AFFIANT SAITH NOT.

Thomas McLemore

THOMAS MCLEMORE

TAKEN, SUBSCRIBED and SWORN to before me on this the 24 day of April, 2007.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Margaret L. McClure
Route 1 Box 116
Chapmanville, WV 25508
My Commission Expires Sept. 7, 2014

My commission expires Sept. 7, 2014.

Margaret L. McClure

NOTARY PUBLIC

AFFIDAVIT OF TERRY JUSTICE

STATE OF WEST VIRGINIA,

COUNTY OF LOGAN, To-Wit:

This day personally appeared before me, the undersigned authority, a notary public in and for the County and State aforesaid, TERRY JUSTICE, who, after being first duly sworn, states as follows:

1. My name is Terry Justice. I live at 416 East McDonald Ave., Man, WV, 25635.

2. I am employed by Apogee Coal Company, LLC at the Guyan Mine as a blaster. I am very concerned about the lawsuit regarding Apogee's North Rum Surface Mine Permit. I am married and have one child. I am my family's main source of support.

3. I have a 12th grade education. I have 28 years of mining experience. I solely depend upon the knowledge I have obtained by working in the mining industry to keep my job.

4. I have no desire to lose my job because of someone's "opinion" of what's right and what's wrong.

5. I have one child who is set on attending college in the fall. Due to my employment she will be able to attend the college of her choice. However, without my job, she will not be able to do that.

6. My desire is not only for my family but also to be able to retire. I have acquired a lot of friends that I want to maintain contact with, so I do not want to leave the area.

7. Personally, I believe the reclamation done at the job is second to none. The land we are mining cannot be walked on before mining, but once we finish with it, it not only is beautiful, but usable.

8. I have attended Mallory Church of God for 20 years. I do not want to leave my church and the congregation because of losing my job.

AND FURTHER AFFIANT SAITH NOT.

Terry Justice

TERRY JUSTICE

TAKEN, SUBSCRIBED and SWORN to before me on this the 24 day of April, 2007.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Margaret L. McClure
Route 1 Box 716
Chapmanville, WV 25508
My Commission Expires Sept. 7, 2014

My commission expires Sept 7, 2014.

Margaret L. McClure

NOTARY PUBLIC

AFFIDAVIT OF RICKY WORKMAN

STATE OF WEST VIRGINIA,

COUNTY OF LOGAN, To-Wit:

This day personally appeared before me, the undersigned authority, a notary public in and for the County and State aforesaid, RICKY WORKMAN, who, after being first duly sworn, states as follows:

1. My name is Ricky Workman. I live at 391 Palmer Avenue, Logan, West Virginia, 25601.

2. I am employed by Apogee Coal Company, LLC at the Guyan Mine as a equipment operator. I am very concerned about the lawsuit regarding Apogee's North Rum Surface Mine Permit. I am married and have two children. I am my family's main source of support.

3. In the past I worked at the Dal-Tex operation which was subsequently shut-down due to a lawsuit which resulted in a very lengthy permit delay.

4. As a result of the Dal-Tex shutdown, I was forced to move my family to North Carolina where I found employment at a much reduced income.

5. When I was able to gain employment back in the mining industry, I was able to move back to West Virginia. This allowed me to begin putting money into my children's college fund, which I was not able to do in North Carolina.

6. I am proud to be a coal miner. We leave the land in better shape than what it is currently.

7. I would really hate for my wife and kids to live at poverty level because someone else doesn't want me to make a living. That's the bottom line.

8. I don't see how people like the anti-mining groups can put a tree or a lizard above a man supporting his family. I've had to leave here once and I don't want to leave here again.

9. The environmentalists frequently push for deep mining as opposed to surface mining. However, the families of the miners lost in the Sago and Aracoma mines would probably agree with my family and have preferred the safer environment of a surface mine than a deep mine. I pray for the families of the Sago and Aracoma miners.

10. There are lots of people who fight to "get on a check", I'm tired of having to continue to fight to keep my job.

AND FURTHER AFFIANT SAITH NOT.

Ricky Allen Workman

RICKY WORKMAN

TAKEN, SUBSCRIBED and SWORN to before me on this the 24 day of April, 2007.

My commission expires Sept. 7, 2014.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Margaret L. McClure
Route 1 Box 116
Chapmanville, WV 25508
My Commission Expires Sept. 7, 2014

Margaret L. McClure

NOTARY PUBLIC

AFFIDAVIT OF ANCIL BELL, JR.

STATE OF WEST VIRGINIA,

COUNTY OF LOGAN, To-Wit:

This day personally appeared before me, the undersigned authority, a notary public in and for the County and State aforesaid, ANCIL BELL, JR., who, after being first duly sworn, states as follows:

1. My name is ANCIL BELL, JR. I live at Box 1424, Chapmanville, WV, 25508.

2. I am employed by Apogee Coal Company, LLC at the Guyan Mine as a equipment operator. I am very concerned about the lawsuit regarding Apogee's North Rum Surface Mine Permit. I am married and have one child. I am my family's main source of support.

3. In the past I worked at the Dal-Tex operation which was subsequently shut-down due to a lawsuit which resulted in a very lengthy permit delay.

4. I have lived in Southern West Virginia all my life. This is the only home that I've ever known. I would like to be able to raise my child here.

5. I've done this type of work for 20 years; this is the only work I know.

6. The environmental groups talked about how it destroys the environment, but on any surface mining job you go on, there is more 4-wheeling, horseback riding, and more animals that anywhere else in the state.

7. I think where the public needs to see the land both before mining and after mining. I think they would agree that the land is better after mining and reclamation.

8. I'm the only source of income for my family.

9. This issue not only effects me, but the local grocery stores and businesses in the area. It affects more than just the people in the mining industry.

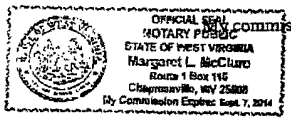
10. I know both sides are biased one way (toward or against); they should take a look at mining such as the Southern App. Property that was mined 20 years ago. If you didn't know it had been mined you wouldn't be able to tell it when you went on the property. There's more flat land, better roads, and better access that could be used in the future for other industries.

AND FURTHER AFFIANT SAITH NOT.

Ancil Bell Jr.

ANCIL BELL, JR.

TAKEN, SUBSCRIBED and SWORN to before me on this the 24 day of April, 2007.



My commission expires Sept. 7, 2014.

Margaret L. McClure

NOTARY PUBLIC

The CHAIRMAN. Mr. Fry.

STATEMENT OF ERIC FRY, DIRECTOR OF REGULATORY SERVICES, PEABODY COAL COMPANY, ST. LOUIS, MISSOURI, ON BEHALF OF THE ILLINOIS COAL ASSOCIATION

Mr. FRY. Good afternoon, Mr. Chairman, Committee members. My name is Eric Fry; I work with Peabody Energy. I am here today representing the Illinois Coal Association, and pinch-hitting for Mark Yingling, who was supposed to be here, but couldn't make it today.

Prior to SMCRA being enacted in 1977, many states, trade associations, and coal operators had already established private-public partnerships to address mine reclamation by working with local legislatures. These groups developed regulations for regrading, soils replacement, and revegetation. Programs like Peabody's Operation Green Earth and the early state programs provided much of the basis for SMCRA, which in turn has guided the mining industry to the current high level of excellence and environmental stewardship.

Mine reclamation has been advanced from what was once identified as one of this nation's major environmental challenges to being a story of success. Now, through initiatives like the Asian Pacific Partnership, many requirements of SMCRA are being used as examples of best practice across the globe.

SMCRA provides for open involvement from stakeholders, regulators, and the public. The permit application, review, and approval and modification process allow for full characterization of the premine resources, consistent mining and reclamation plans, public input, and dependable bright lines. The applicant violator system, financial assurance requirements, and bond release performance standards assist in maintaining a high degree of industry credibility.

The ever-present inspection and enforcement provides for ongoing dialogue in planning and performance requirements. Reclamation of prime farmland, water resources, fish and wildlife resources,

forestry and rangeland once thought to be a major challenge is now routinely accomplished. These ongoing successes support the realization that mining is a temporary use of the land, and that value creation can extend well beyond mineral extraction.

A large part of the success of SMCRA is attributable to the singular focus on mining, as opposed to programs that address multiple industries. SMCRA is a mature program, administered by experienced and knowledgeable mining professionals in both Federal and state programs. This level of professionalism helps to provide the consistency and regulatory certainty needed by a dynamic coal industry.

While SMCRA has proven to be a successful program, there is always room for improvement. A concerted effort should be made to fully utilize existing resources. Examples include items such as the AML Fund, where remaining projects should be finished as soon as practical.

Sections 401 and 404 of the Clean Water Act are, for the most part, addressed in SMCRA requirements. This triple-overlap of regulation is confusing, inefficient, costly for both operators and regulators, and blurs the bright lines.

Additionally, while SMCRA provides solid guidance, a one-size-fits-all approach is not always appropriate. Coal regions span the U.S. and have wide ecological, hydro-geological, and climatological differences. SMCRA needs to allow for flexibility in the use of local proven practices, such as grading diversity, that creates wildlife protection zones, small depressions that supplement the landscape, topsoil substitutes that improve plant diversity, and partial highwall retention that improves wildlife habitat and aesthetics.

I have some time left. I have a few slides. Go to the third one, active research. No, no, back. I think you picked the wrong one.

There we go. Now to the third one. Peabody engages in active research programs. Some examples in the Midwest are the American Chestnut Foundation. That is a study of adaptability of chestnut trees on reclaimed land. We have a study with the University of Kentucky to study the growth rates for trees on reclaimed land. We work with the Indiana Division of Reclamation to study soil handling techniques.

Go to the next one. No. No. This isn't working very well. Sorry. Back. There we go.

Community outreach is important. Several ways that we do this are to hold open houses, field days that invite exchange between industry, agencies, and academia. The Sierra Club has come to these field days before.

Also, educational workshops that are, that take place on the mines. OK, the next one. There we go.

Large wildlife areas are sometimes created. In this example in Illinois, the River King Fish and Wildlife Area, 1800 acres of water and wetlands. And this is just one example of many. Next one.

Ongoing wildlife research. This isn't in the Midwest, but this is a research project that North Antelope Rochelle, a three-year research project on greater sage grouse. Next one.

Arizona Best Practices and Reclamation recognized at the International Global Awards. Next one.

The Asia Pacific Partnership promotes sustainable practices. This is an international agreement between Australia, India, Japan, China, and Korea, and involves the development and transfer of technology on environmental issues. That is good.

That is what I have got. Thank you very much.

[The statement submitted for the record by Mr. Fry on behalf of Yingling follows:]

Statement of Mark R. Yingling, VP of Environmental Services and Conservancy, Representing Peabody Energy and the Illinois Coal Association

Mr. Chairman, my name is Mark Yingling. I am the Vice President of Environmental Services and Conservancy for Peabody Energy and a member of the Executive Board for the Illinois Coal Association and I am committed to the proper utilization and sustainability of this country's natural resources.

According to the U.S. Energy Information Administration, the United States currently imports 59 percent of its oil requirements. This dependence is expected to grow 70 percent by the year 2025. Additionally, natural gas accounts for 16 percent of America's energy imports.

Even with our current dependency on foreign energy supplies, we need to celebrate the enormous American coal resource that has added to the security of energy in the United States. Coal mining shoulders half of this Country's electricity generation while lessening the dependence on foreign oil and, increasingly, our dependence on imported natural gas.

Prior to SMCRA being enacted in 1977, many State Agencies, Trade Associations and Coal Operators, in conjunction with local Legislatures, had already established private/public partnerships to address mine reclamation. These groups developed regulations for re-grading, soils replacement, and revegetation. Programs like Peabody's Operation Green Earth and the early State regulation provided much of the basis for SMCRA which, in turn, has guided the mining industry to its current high level of excellence in environmental stewardship. Mine reclamation has advanced from one of this Nation's major environmental challenges in the 70's to being a success story of private/public partnership. Through initiatives like the Asian Pacific Partnership, many requirements of SMCRA are now being used as examples of best practice across the globe.

SMCRA provides for open involvement from stakeholders, regulators, and the public. The permit application, review, approval and modification processes allow for full characterization of the pre-mine resources, consistent mining and reclamation plans, public input, and dependable "bright lines". The Applicant Violator System, Financial Assurance requirements and Bond Release performance standards assist in maintaining a high degree of industry credibility. The ever present inspection & enforcement provides for ongoing dialogue on planning and performance requirements. Reclamation of prime farmland, water resources, fish & wildlife resources, forestry, and rangeland, once thought to be a major challenge, now is routinely accomplished. These on-going successes support the realization that mining is a temporary use of the land and that value creation can extend well beyond mineral extraction.

A large part of the success of SMCRA is attributable to the singular focus on mining as opposed to programs that address multiple industries. SMCRA is a mature program administered by experienced and knowledgeable mining professionals in both the Federal and State programs. This level of professionalism helps to provide the consistency and regulatory certainty needed by a dynamic coal industry.

While SMCRA has proven to be a successful program, there is always room for improvement. The ingenuity that has given confidence to achieving many sensitive and difficult performance standards now needs to be used to become more efficient in meeting and even exceeding these same requirements. A concerted effort should to be made to fully utilize existing resources. A prime example includes the AML fund where remaining projects should be finished as soon as practical.

Another area that should be fully promoted are the benefits of reduced grading which includes lower soil compaction, reduced erosion, higher soil moisture retention, better water quality and lower fuel consumption. An associated benefit of reduced grading is increased vegetation production both above ground and within the rooting media which all leads to greater uptake and retention of atmospheric carbon dioxide.

An ongoing source of permitting inefficiency is Section 401 and Section 404 of the Clean Water Act. These requirements are, for the most part, addressed in the

SMCRA requirements. This triple overlap of regulation is confusing, inefficient, costly (for both Operators and Regulators), and blurs the "bright lines".

Additionally, while SMCRA provides solid guidance, a "one-size-fits-all" approach is not always appropriate. Coal regions span the U.S. and have wide ecological, hydro-geological, and climatological differences. SMCRA needs to allow for flexibility in the use of local proven practices such as grading diversity that creates wildlife protection zones, small depressions that supplement the landscape, sinuous drainage patterns that improve drainage stability, topsoil substitutes that improve plant diversity and partial highwall retention that improves wildlife habitat and aesthetics.

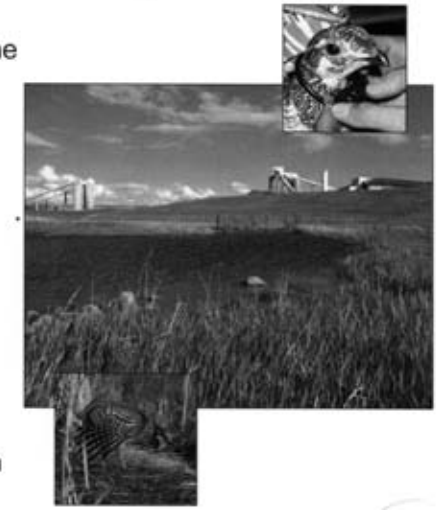
Thank you for allowing me to provide these comments. Following is a brief set of slides on a few of the many successes during the past 30 years of SMCRA.

Illinois Lands Mined for 50 Years Create Magnet for Wildlife

- River King Fish and Wildlife area donated to expand Kaskaskia wetlands in Illinois
- Features 1,800 acres of water and wetlands that are home to Giant Canada Geese, egrets and heron
- Complex water management system includes series of levees and settling basins to protect water quality

Powder River Basin Wildlife Habitat Restoration Protects Sage Grouse

- North Antelope Rochelle Mine recognized for voluntary three-year research project on greater sage grouse
- Program identified habitat preferences, favorite vegetation and tracks 50 sage grouse via radio-collar transmitters
- Priority areas for plantings defined
- Program recognized by the Wyoming Wildlife Federation



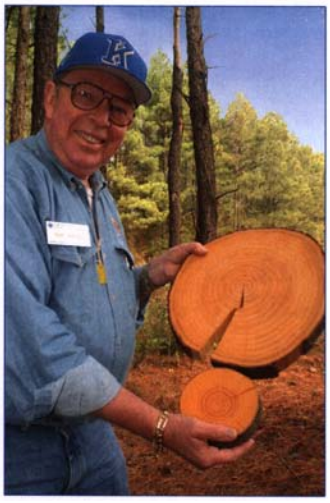
U.S. Reclamation Practices Serve as Global Sustainable Model

Asia Pacific Partnership Promotes Sustainable Practices

- International agreement among U.S., Australia, India, Japan, People's Republic of China and Korea
- Partners are cooperating on development and transfer of technology to reduce greenhouse gas emissions
- Nations are collaborating on best practices in safety, reclamation, abandoned mine lands and other environmental issues

Asia-Pacific Partnership on Clean Energy and Climate Meeting, 2006

How We Can Build Upon our Environmental Success



- Educate global stakeholders on 3Es
- Provide U.S. reclamation model as a teaching tool for developing nations
- Continue to use field-tested best practices to improve compliance
- Allow flexible grading standards
- Continue to support AML

STATEMENT OF MARION LOOMIS, EXECUTIVE DIRECTOR, WYOMING MINING ASSOCIATION, CHEYENNE, WYOMING

Mr. LOOMIS. Mr. Chairman, Congressman Pearce, thank you for inviting us to come back today. I am Marion Loomis, the Executive Director of the Wyoming Mining Association.

The Wyoming Mining Association represents bentonite coal, trona, and uranium producers in Wyoming. I am sure that you are aware that Wyoming leads the Nation in production of coal, but you may be interested to know that Wyoming also leads the Nation in the production of bentonite, trona, which is converted into soda ash and is a primary ingredient in the manufacture of glass, and we lead the Nation in the production of uranium.

Wyoming coal mines now produce almost 450 million tons of coal annually, which is 38 percent of this nation's coal production. Wyoming coal is shipped to 36 states, from New York to Washington and Texas to Minnesota.

Mr. Chairman, some feel that Wyoming just started producing coal after the Clean Air Act passed in 1970, and indeed, that was one of the reasons for the tremendous growth in coal production in Wyoming. But Wyoming started producing coal in 1869, with the completion of the Trans-Continental Railroad. At our peak prior to 1970, Wyoming produced 9.8 million tons of coal in 1945, and our peak employment came in 1922, with 9,000 miners. So Wyoming has had a long history of providing coal to fuel this country's energy needs.

After the railroad switched from coal to diesel, Wyoming reached a low in production in 1958, with 1.6 million tons, and a low of employment in 1967, with only 332 miners. However, the industry turned around in the 1960s, with the construction of several coal-fired power plants. By the time the Surface Mining Control and Reclamation Act passed, Wyoming mines were producing 44 million tons per year, with employment of 3300 miners.

The late 1960s, the mining industry in Wyoming recognized that mine lands needed to be returned to a productive use after mining. The industry and the Wyoming Mining Association worked with legislators to pass a reclamation act in 1969, called the Open Cut Land Reclamation Act, and it applied to all minerals, not just coal. All mined minerals.

Granted, that first act was rather weak by today's standards, but it shows that the industry recognized the need for a reclamation law that applied to everyone, so no one company had an advantage over another. The 1969 Act was replaced with a much more comprehensive act in 1973, which addressed not only land reclamation, but air quality, water, and solid waste issues.

The industry has struggled to make the provisions of SMCRA work in the arid West, where a lack of water and topsoil much different than in the East, where there is abundant rainfall and plenty of topsoil. It is difficult to make the one-size-fits-all mandates of the Federal law work in all the areas. SMCRA and the Federal regulations do recognize the difference between these areas that receive less than 26 inches of precipitation, and those that receive more. Currently this is reflected in an extended bond liability period, but we feel this is an area that should be explored to expand and enhance reclamation options.

Congress also recognized differences in mining areas of the country, when Representative Roncalio from Wyoming was successful in including a provision that recognized the unique features of a special bituminous mine. If that provision had not been inserted, one

of the truly remarkable mines in Wyoming would have not been able to operate.

The Kimmler Mine, located in southwest Wyoming, has multiple coal seams, with the bottom seam over 100 feet thick. The Act recognized that the backfill provisions of the Act would not work for the Kimmler Mine, and a special provision was written into the Act to allow for a different reclamation procedure to be used. That mine opened in 1897, and is still operating. To date, the Kimmler Mine has produced over 148 million tons of coal.

We have seen a growing understanding of the differences in the mining areas by those administering the Federal Act. One of the concerns of our companies was the ability to restore wildlife habitat. In many cases, the pre-mining wildlife habitat is eroded gullies and arroyos, which cannot be part of a successful reclamation effort. Our reclamation has to be erosionally stable.

But we can take part in the reclaimed highwall and create an erosionally stable wildlife feature that will provide protection, diverse vegetation, and the ability to store water. We are pleased that OSM is now working with the industry to allow us to create these features in the post-mine topography as a replacement for natural habitat removed by mining.

We encourage the Committee to support OSM's efforts to design and implement policy which will facilitate mining companies to create wildlife habitat.

You are very aware of the Abandoned Mine Land Reclamation fund, and there has been a lot of talk about it here today. We are very pleased that Congress will fund the balance of the AML fees owed to the states. And thank you, Mr. Chairman, and we want to also express our thanks to Congresswoman Cubin, for all of her efforts and your efforts in this regard.

Wyoming producers have paid well over $2.3 billion in AML fees over the last 30 years, and we are very appreciative that the portion owed to Wyoming will now come back for the many uses the state has to address mineral-impact issues.

We are, however, somewhat concerned that OSM seems to believe that the money will only be released when projects are identified. Our understanding of the Act that you passed last year requires that the back balance be paid in equal installments. The Wyoming Legislature passed legislation this year to hold those back payments until the Legislature decides how to allocate those monies. It is our hope that the back payments would come to the state without any strings attached.

In summary, we feel the industry, OSM, and the states have come a long way in the past 30 years. We are producing more coal, reclaiming more land, and providing a reliable, affordable energy resource for this nation. As we go forward, it is our hope that we will continue to work together to address the many issues that will face us to allow the industry to continue to provide a secure source of energy for our nation, and still restore the land to a beneficial use after mining is completed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Loomis follows:]

Statement of Marion Loomis, Wyoming Mining Association

Mr. Chairman, my name is Marion Loomis. I am the Executive Director of the Wyoming Mining Association. The Wyoming Mining Association (WMA) represents bentonite, coal, trona and uranium producers in Wyoming. You know that Wyoming leads the nation in production of coal, but you may be interested to know that Wyoming also leads the nation in the production of bentonite, trona (which is converted into soda ash for use in glass and chemical manufacturing) and uranium.

Wyoming coal mines now produce almost 450 million tons of coal annually which is 38% of this nation's coal production. Wyoming coal is shipped to 36 states from New York to Washington and from Texas to Minnesota.

Mr. Chairman, some feel that Wyoming just started producing coal after the Clean Air Act passed in 1970 and indeed that act was one of the reasons for the tremendous growth in coal production in Wyoming, but Wyoming started producing coal in 1869 with completion of the transcontinental railroad. At our peak prior to 1970 Wyoming produced 9.8 million tons in 1945, but our peak employment was in 1922 with 9,192 miners, so Wyoming has had a long history of providing coal to fuel this country's energy needs. After the railroads switched from coal to diesel, Wyoming reached a low in production in 1958 with 1.6 million tons and a low in employment in 1967 with only 332 miners. However, the industry turned around in the 1960's with the construction of several coal fired power plants. By the time the Surface Mining Control and Reclamation Act (SMCRA) passed, Wyoming mines were producing 44 million tons per year with employment of 3,300 miners.

In the late 1960's the mining industry in Wyoming recognized that mined lands needed to be returned to a productive use after mining. The industry and the Wyoming Mining Association worked with legislators to pass a reclamation act in 1969 called the Open Cut Land Reclamation Act and it applied to all mined minerals, not just coal. Granted that first act was rather weak by today's standards, but it shows that the industry recognized the need for a reclamation law that applied to everyone so no one company had an advantage over another. The 1969 act was replaced with a much more comprehensive act in 1973 which addressed not only land reclamation, but air quality, water, and solid waste issues.

The industry struggled to make the provisions of SMCRA work in the arid west where the lack of water and topsoil make reclamation much different than in the east where there is abundant rainfall and plenty of topsoil. It is difficult to make the one size fits all mandates of the federal law work in all areas. SMCRA and the federal regulations do recognize a difference between those areas that receive less than 26 inches of precipitation and those that receive more. Currently this is reflected in an extended bond liability period but we feel this is an area that should be explored to expand and enhance reclamation options.

Congress also recognized differences in mining areas of the country when Representative Roncalio from Wyoming was successful in including a provision that recognized the unique features of special bituminous mines. If that provision had not been inserted, one of the truly remarkable mines in Wyoming would not have been able to operate. The Kemmerer mine located in Southwest Wyoming has multiple coal seams with the bottom seam over 100 feet thick. The Act recognized that the back fill provisions of the Act would not work for the Kemmerer mine and a special provision was written into the Act to allow for a different reclamation procedure to be used. That mine opened in 1897 and is still operating. To date the Kemmerer mine has produced over 148 million tons of coal.

We have seen a growing understanding of the differences in the mining areas by those administering the federal act. One of the concerns of our companies was the ability to restore wildlife habitat. In many cases the premining wildlife habitat is eroded gulleys and arroyos which cannot be part of a successful reclamation effort. Our reclamation must be erosionally stable. But, we can take part of the reclaimed highwall and create an erosionally stable wildlife feature that will provide protection, diverse vegetation and the ability to store water. We are pleased that OSM is now working with the industry to allow us to create these features in the post mine topography as replacement for natural habitat removed by mining. We encourage the Committee to support OSM's efforts to design and implement policy which will facilitate mining companies creating wildlife habitat.

You are very aware of the Abandoned Mine Land Reclamation fund. We are very pleased that Congress will fund the balance of the AML fees owed to the states and thank you, Mr. Chairman and Representative Cubin for your efforts in this regard. Wyoming producers have paid well over $2.3 billion in AML fees over the last 30 years and we are very appreciative that the portion owed to Wyoming will now come back for the many uses the state has to address mineral impact issues. We are, however, somewhat concerned that OSM seems to believe that the money will only

be released when projects are identified. Our understanding of the act that you passed last year requires that the back balance be paid in equal installments. The Wyoming legislature passed legislation this year to hold the back payments until the Legislature decides how to allocate those monies. It is our hope that the back payments would come to the state without any strings attached.

In summary, we feel the industry, OSM and the states have come a long way in the past 30 years. We are producing more coal, reclaiming more land, and providing a reliable, affordable energy resource for this nation. As we go forward, it is our hope that we will continue to work together to address the many issues that will face us to allow the industry to continue to provide a secure source of energy for our nation and still restore the land to a beneficial use after mining is completed.

Thank you for allowing me to provide these comments.

Mr. PEARCE. The Chair thanks the panel for their testimony.

Bill, let me say first to you, I really appreciate your testimony. It was right on target, in my opinion. Your membership is a practicing environmentalist. And I have known many of your members, not just as constituents and good corporate citizens of the Congressional District I am honored to represent, but also as lifelong friends. And I know that what you said was from the heart, because your membership—we all are environmentalists, let us face it; each and every one of us are environmentalists.

And the jobs that your membership provides are appreciated by all of West Virginia, and by this nation. And many of your membership just finished involving themselves with the most successful Friends of Coal Auto Show since you have been putting that on. And it was a great performance, a great turnout this past weekend in my hometown. Congratulations on that.

I want to ask my first question, though, to Hal, who I must say I am pleased to finally get before this committee, because we go way back, as well. Your experiences on mining issues are well known, and I certainly look forward to working with you on reforming the Mining Law of 1872. And we are working together on that.

Mr. QUINN. Yes, we are.

The CHAIRMAN. And people can say what they want about mountaintop removal mining, or they can say what they want about me, a coal miner from the East, trying to do, as they put it, what I am trying to do to the hardrock mining industry in the West. They can say what they want about it. But at least, at least our surface mining coal mining industry has some Federal standards on the books governing their mining and the reclamation. And at least our mining industry pays a royalty when it comes to mining on Federal lands.

So Bill, let me go back to you and ask you my first question, I guess. No, Hal, would you wish to comment on that?

Mr. QUINN. Mr. Chairman, as you stated, we welcome the opportunity to work with you on the mining law, as we have discussed in the past.

The CHAIRMAN. Which would kick off tomorrow, by the way. Our first hearing.

Mr. QUINN. You will hear from a representative of our organization tomorrow, and I appreciate that invitation for that. We are looking forward to working with you in trying to find the balance, just like SMCRA struck a balance, but find some balance in how to make some changes to the mining law that served the country,

served the industry, and move us forward on those issues, and keep us competitive.

The CHAIRMAN. Bill, let me ask you. Has SMCRA truly leveled the playing field? Now, I am not trying to create regional rivalries, because, as we all know, one of the purposes of SMCRA was to eliminate state competition, state versus state, or trying to undercut each other in order to sell more coal.

But is the regulation of surface mining in the Commonwealth of Kentucky, for example, the same as it is in the State of West Virginia?

Mr. FRY. You know, as far as from a SMCRA standpoint, Mr. Chairman, I think it very much has leveled the field. And this is a perception from me, sitting in West Virginia not doing a great deal of study of other states. But my perception of that is that SMCRA clearly has leveled it.

And where we run into disparity of, either on operations or enforcement regulation lawsuits being riled, are these eternal conflicts with the Clean Water Act and the interpretation that is given to them in different states, as compared to what we have in West Virginia. And that seems to be where we have the most difficult.

And insofar as a framework created by SMCRA, I think it has very much leveled the playing field. When you think about where you were in 1977, and all the things that were going on in the different states then, then I think it very much has brought consistency to regulation along the line.

The CHAIRMAN. So we don't have one state trying to undercut a neighboring state now in order to sell their coal.

Mr. FRY. That is certainly not my perception, no. There is not enough coal being mined in this country to take care of this country's needs right now, which is a very fortunate position to be in. But, and we hope that condition continues, unlike some of those that came before us on testimony. We hope we continue to can't mine enough coal to meet America's needs.

The CHAIRMAN. Let me continue to ask you to comment on one of the themes of the hearings today, which is the issue of whether mountaintop removal operations are indeed complying with the letter and the intent of SMCRA. With respect to the AOC variances and those more beneficial post-mine land-use plans.

Mr. FRY. Absolutely they are. In our opinion, Mr. Chairman, they clearly are. And I think it is demonstrated, we are always in someone's front window in West Virginia, it seems like. And those are clearly being done, and approximate original contour is being achieved. And if it is not being achieved, then there is a post-mining land use that is in the plan to be accomplished following the mining.

Is every site being developed? No, it isn't. But what site is not being developed is being restored to the approximate original contour.

We do have a definition in West Virginia, a very clear definition. And it has come as a result of the agencies joining together, the initiative of the state, as well as the initiative of the industry. And we know what it is. It is spoil minimizations. Very complicated. A bunch of engineers put it together. I mean, you have to work your

way through it. We know what that is in West Virginia, and we are doing that. And we are very pleased about it.

It is a little bit aggravating to have everybody come in and disparage the fact that it is not working, because we have a whole gang of people every day that show up making sure it is working. And I think it clearly is working, and it is thanks to the cooperation of a whole lot of people in West Virginia.

The CHAIRMAN. So you believe we can have a dovetailing of the interests of protecting our environment and mining coal at the same time.

Mr. FRY. Absolutely. And the real benefit, the thing that we have lost in all this tale of lawsuits that runs around, is what a rare commodity and a valuable commodity level ground is in southern West Virginia in your district, Mr. Chairman. And in order to—we are finally getting smart enough to coordinate mining and highway construction, and those kinds of things.

But just to leave the ground in a more moderate slope than what it was naturally there is a tremendous opportunity for an economic development in the future.

Well, we pretty much have forgone that, thanks to all these lawsuits and everything, where you have to stack and build that mountainside back up now, unless you have a very specific plan. So we are trying to do a better job of coordinating mining with the economic development, thanks to the agency that was created under Governor Underwood you referenced and all of those things.

So we are getting a little smarter about that. But the travesty is that there is a lot of level ground that is being stacked back up to 60 percent slopes.

The CHAIRMAN. Thank you, Bill. The gentleman from New Mexico.

Mr. PEARCE. Thank you, Mr. Chairman. Mr. Quinn, what I read from H.R. 2337, Title IV, subtitle D, Chapter 2, it talks about having the Secretary really to assist, to develop policies that will assist wildlife populations and their habitats in adapting to and surviving the effects of global warming. That is kind of a theme that runs through this entire, of the section 42, and in the pages around that.

Have you had a chance to take a look at that? And can you give some idea of what that is going to mean to miners?

Mr. QUINN. Congressman, I have not looked at that section. And I will give my attention to that and try to respond to the question. But from what you read, I really don't know what it would mean, or how we would go about doing it, to be quite honest with you.

In terms of trying to study the effects of——

Mr. PEARCE. No, it is not to study. It is to assist wildlife populations and their habitats in adapting to and surviving the effects of global warming.

Mr. QUINN. Well, it would certainly add a new and very large wrinkle to our resource planning, under SMCRA or any other law that I am aware of at this point in time. But I am not familiar with the section, sir.

Mr. PEARCE. OK. If you get a chance to review that, you might give me your input.

Mr. QUINN. Thank you.

Mr. PEARCE. Mr. Raney, I appreciate your testimony. Now, you heard testimony from Mr. Lovett, who is also from West Virginia, and he was unimpressed with the state and their oversight, and with the OSM and their oversight. And maybe even, I don't know if he actually said it, but I kind of got the idea that it might just be a bunch of a wink and a nod, and send them on their way, as the regulators looked at the companies.

Do you have a particular perspective? Do you see any of that looking the other way, where the law is just not enforced?

Mr. RANEY. No, sir. Mr. Lovett and I ride on different sides of the bus, I guess. So no, absolutely not. And I mean, I represent a whole bunch of companies that are full of engineers and mine managers that absolutely would argue incessantly that that is patently untrue.

And it is one of those babbling allegations that comes from those opponents to the industry, I think, that has absolutely no substance whatsoever behind it.

Mr. PEARCE. Mr. Fry, we have also the allegation that, in the testimony that I was referring to, that they just are allowed not to say the topsoil, very few say the topsoil is exact quote. And yet I see things growing. I see crops, and I see grass, and I see things like that.

Do you all not see the topsoil? Is that fair? Is that an accurate allegation?

Mr. FRY. Well, I can't really respond to that definitely in West Virginia. But in the——

Mr. PEARCE. No, I am talking about in general. In general. I mean, the reclamation, the Surface Mining Act is going to apply everywhere, so surely you have to——

Mr. FRY. Yes, if you go to the mines in the Midwest and out west, you will find large piles of topsoil that are put back to——

Mr. PEARCE. Talk to the microphone. I flew jets for an awful long time.

Mr. FRY. Sorry. The answer to your question is yes, that most mines you go to you will find large piles of topsoil that are put back. They are vegetated to prevent erosion, and there is a requirement to put them back during the reclamation process.

Mr. PEARCE. Now, in Mr. Wright's testimony, he claims on page two that he can say with complete confidence that coalfield residents will not get meaningful protection for their health and their water unless we step in and demand that protection. Do you all find the OSM to be that functionless? In other words, do you find them to be an easy touch for a company to go into and just move right on past? That was kind of the feel; that they are toothless, that they do not do their job very well in providing for protection. Can you talk about that just a bit?

Mr. FRY. Yes. You are mostly dealing with the state programs, and then most of the states that I am familiar with, if someone has an issue with water, there is a requirement that the company provide the water before it is known that the company is at fault.

No, there are very strict rules to make sure that water is replaced, and that best management practices are practiced in order to prevent water contamination to the degree possible.

Mr. PEARCE. Mr. Chairman, I have some other questions if you have a second round. Thanks.

The CHAIRMAN. Go ahead.

Mr. PEARCE. Thanks. OK. Similarly, on this testimony of Mr. Wright, the, page four, he has a fairly long section where he is talking that Indiana test seems to remove mines from any accountability to groundwater standards. Do you all mine in Indiana?

Mr. FRY. Yes.

Mr. PEARCE. Do you find that Indiana does not, do they not have—tell me about the enforcement mechanisms you all have had to go through on groundwater standards.

Mr. FRY. Groundwater standards are set by the states. And some states don't have groundwater standards, and other states do have groundwater standards, and they differ in each state as to——

Mr. PEARCE. And you have to comply. I mean, do you have to do clean-ups? You have to make sure it is not contaminating, it is not having the aquifers contaminated, or whatever?

Mr. FRY. Yes, there are specific standards that have to be met. As you probably know, that in a spoil aquifer, that there is some mineralization that takes place, and there is not anything you can do about that. And that is taken into effect in the groundwater standards of some states.

Mr. PEARCE. Mr. Fry, the 2262, the Hard Rock Mining Act, has a section in it which asks that the permits be reviewed every three years. From a mining point of view and working with bankers, my experience with oil and gas is that you are not going to get a project funded if you only have three years worth of approval.

Can you address whether or not your financing is going to be facilitated or made more difficult if you have a permit review process that is only three-year windows, and then is up for review? At which point it could be declined, or maybe approved again. Could you address the financing possibilities that that will affect?

Mr. FRY. I am not sure that I understand that question.

Mr. PEARCE. OK, that is a little out of your area. But just, if you have—mines are basically the same sort of financial structure. And I am asking a permit process. Now, I know you are not hardrock mine, you are a coal mine. But if a mine only had a window of three years, at which time it would have to come up for review for its permit again, I am asking is that going to be a process that the banks look on with favor? Or is that going to penalize you and give you a higher rate, or maybe limit capital?

Mr. FRY. I would certainly guess the latter. And as you gentlemen know, mining is very capital-intensive; you have to lay out a lot of money at the front end of it. And regulatory uncertainty certainly is a big issue.

Mr. PEARCE. Mr. Raney—this will be my last question, Mr. Chairman. Mr. Raney, you have mentioned the lawsuit after, suit after suit that threatened your jobs. Do you find, when those suits are filed, that they have a justifiable outcome? Or do they appear to be simply a stalling mechanism, or may be a mechanism to try to stop the mine from actually going forward? Or can you, even if you disagree with it, look at the suit and say well, it is not my approach, but I understand what they are getting at; or do they appear to be frivolous?

Mr. RANEY. In my opinion, they are frivolous. They file the same suit after, and after they just get a little different approach to it, file the same suit. We go to Richmond, to the Fourth Circuit. Thank goodness the Fourth Circuit overturns it. And we made two or three trips down there already; they have done that. And we come back, and then we are confronted with another suit very similar to, questioning the very same thing. Find another judge, and you get the decision at the District Court level that just absolutely paralyzes the permitting process. And not so much at the state level with the SMCRA permits, but it just paralyzes the issuance of the Corps of Engineer 404 permits and the Clean Water Act.

So it is that almost, you don't see the effect of it, but what happens is they are just tying the hands and the minds of those permit-issuing authorities with the confusion that is created in the courts. I sort of think that they are frivolous, and I think they are an effort to delay, and just trying to disrupt the coal industry of particularly our state. And they reach across state lines every once in a while and do the same thing to Kentucky.

Mr. PEARCE. I find the same thing in New Mexico, not necessarily with miners, but with forestlands or whatever, that the same objection is filed over and over. So if they were trying to find factual evidence or an answer, they would get that and then say OK, we disagree with the opinion. But instead it is filed and filed, and then injunctions or whatever.

Thank you again. A great panel, and a great hearing, Mr. Chairman. Thank you very much.

The CHAIRMAN. Let me say to the gentleman from New Mexico, if he was referring to my hardrock mining law reform bill, is that the bill——

Mr. PEARCE. Is this yours, Mr. Chairman?

The CHAIRMAN. That is my name on it, yes.

Mr. PEARCE. Oh. I was just reading it in big print, sir.

The CHAIRMAN. Well, read the fine print there; you will find my name on it.

Mr. PEARCE. OK.

The CHAIRMAN. If you are referring to the three-year permitting review process, I would just remind the gentleman we in this body are up for review every two years.

Mr. PEARCE. We also don't finance, Mr. Chairman.

The CHAIRMAN. Oh, we spend a lot of finances every two years.

Let me say to the panel and to all the witnesses that were before us today, we certainly appreciate you being with us. There were a number of issues discussed, specifically the Clean Water Act, for example, concern to many in the industry, an issue over which this committee does not have jurisdiction. We discussed CTL today, as much as this gentleman is in favor of it, again an issue over which this full committee has no jurisdiction, but rather, other committees of the Congress.

I am going to ask the panel in toto, give them a chance, that is, since they have been so patient with us, and one of the advantages, I guess you might say, of being last in a long day, is I am going to give each of you a chance to respond to anything you have heard during the course of the day. I believe most of you, if not all of you,

have been here during the course of the day. Have a free shot at anybody. Go ahead.

Mr. LOOMIS. Well, you know, my daddy said not to say anything bad about people if you can't say something good.

You know, one thing I want, to invite the gentleman from New Mexico to come see some reclamation. I know you, as a panel, were invited to come see what Attorney Lovett suggested you need to come look at. And you, Mr. Chairman, have, of course, many times been on reclamation sites in West Virginia. And I would encourage you to bring any member of the Committee, all of the Committee, and certainly the staff, to come and look at West Virginia, and see what we are truly doing. We are very proud of it, and the people that are there every day doing it are very proud of it, as you well know, Mr. Chairman.

But to you, sir, from New Mexico, I would certainly invite you to West Virginia and to Kentucky. I think any of the states that I mentioned would welcome you to come and look, and see that we are proudly mining coal, and meeting, we think, the energy needs of this country in a very professional manner.

I notice, it is not up there now, but you, Mr. Chairman, are aware of Twisted Gun. And I promised the Buckskin Council that I would let you know today that the Buckskin Council is conducting their annual fund-raising golf tournament on Twisted Gun today in Mingo County, which is just full of valley fills, and happens to be one of those dreaded mountaintop operations that other testifiers have spoken so harshly about today.

But I don't have any particular problem with anybody that appeared here today. They have all got their own opinions. We appreciate very much the opportunity, and we like to parade what is going on in West Virginia because we are very, very proud of it. So thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Bill. Anybody else?

Mr. QUINN. If I could just supply the Committee——

The CHAIRMAN. Yes, Hal.

Mr. QUINN.—with some facts. Congressman Pearce was asking some questions at the outset of the hearing this morning.

The amount of the production annually is about 1.2 billion tons. You wanted to know how many miners; I think Mr. Roberts answered that correctly. But the full employment directly is about 123,000 nationwide. Average wages annually is about $64,000 for a coal miner, and we know many a coal miner who will make plenty more than that once they do their overtime. It could go up to 80 or more thousand dollars a year.

And the value of our product is about $28 to $30 billion annually, not including once it has passed upstream through electricity.

Mr. Chairman and Congressman Pearce, I would also like to say a word. Thanks for your support on issues related to the development of a coal-to-liquids industry. And just to mention that, as you know, Mr. Chairman, there will be a symposium that we are cosponsoring with other groups in your district next month.

And thank you for your invitation today again.

The CHAIRMAN. Thank you, Hal.

Mr. LOOMIS. Mr. Chairman, I would echo what Mr. Raney said, too. We would welcome you and your committee to come to Wyo-

ming and look at some of the reclamation that we have been able to accomplish, some of the wildlife habitat that we have been able to create.

I grew up on a ranch and hated prairie dogs all my life. But one of the crowning achievement of one of the mines is reestablishment of a prairie dog colony on some of their reclamation, and creating habitat for the mountain plover, which is a threatened species. So we are doing some innovative things there that the industry is very proud of, and we would love to show it off to you.

Mr. FRY. I am going to pass. Thank you very much.

The CHAIRMAN. Gentlemen, thank you. Thank you for your patience and being with us today.

As I conclude this oversight hearing on the 30th anniversary of SMCRA, let me say, Moe, this one is for you. Committee adjourned.

[Whereupon, at 3:12 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

[A letter submitted for the record by Cathie Bird, Chair, Save Our Cumberland Mountains, on behalf of the members of SOCM Stripmine Issues Committee, follows:]

SAVE OUR CUMBERLAND MAMMALS
224 S. Main Street, Suite 1 * PO Box 479
Salt Lake City, TN 37769 * http://www.socm.org
865-426-9455 * FAX 865-426-9289

August 3rd, 2007

Jim Zoia, Staff Director
Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, DC 20515
http://www.house.gov/resources

Dear Mr. Zoia and Members of the Committee,

Thank you for the opportunity to comment on SMCRA at its 30-year anniversary. A reading of the original SMCRA legislation makes it clear that coal extraction for U.S. energy supply was, at the time, to be supported by the Act. It is interesting to note that the majority of paragraphs specify the intention of Congress to protect citizens and the environment from known effects of surface mining that disturb surface areas in ways that "burden and adversely affect commerce and the public welfare" [30 USC 1201 § 201(c)].

Save Our Cumberland Mountains (SOCM), a member-run organization that encourages civic involvement among Tennessee people so that they may have a greater voice in determining their future, was very involved with other grassroots organizations in the initial SMCRA legislative process. When the Act became law in 1977, SOCM members hoped that it would bring destructive surface mining practices under control in their Appalachian homelands, but realized that coalfield citizens would have to stay involved and alert to potential shortcomings of the Act. At this 30th Anniversary of SMCRA, many coalfield residents are not secure in the belief that their homes, communities and mountains are being protected as this law envisioned.

Problems with enforcement

SMCRA was designed to protect private property from water pollution, blasting, and other damage by surface mining, and to give citizens a way to seek recourse if such damage occurred. In too many cases this is not happening. People are left with cracked foundations, caked coal dust on their houses, and hot and cold running black sludge from their faucets. A recent study of violations and complaints about Zeb Mountain Mine in Campbell and Scott counties in Tennessee revealed that blasting has caused thousands of dollars in damage to several homes. In one of these homes, the water is no longer fit to drink. Citizens are given ridiculous explanations for their cracked walls such as "closing windows, rocking in a rocking chair

or jumping rope." The residents get little help from OSM enforcement personnel who are supposed to be protecting them, and. have had to shoulder the burden of responsibility for fixing the damage. We hope that members of the Committee will be as outraged as we are here in the coalfields, and that you will investigate why such things are still happening under SMCRA 3D-years after its adoption. Unfortunately, enforcement problems also allow damage to water, wildlife and forest resources.

According to a SOCM enforcement case study at Zeb Mountain, located in Elk Valley, 1N. From the start of surface mining in 2003 to the present, a total of 31 violations have been issued. For seven of the violations, the federal office of surface mining has granted extensions. Of the seven violations, four of those violations had over 12 extensions translating into 3-years of extension per violation. This is of grave concern to citizens who's homes and water have been damaged as a result of these violations.

OSM has granted large numbers of numerous violations incurred by coal operators. In addition, the mine operator has filed many permit revisions, some of which were intended to fix situations created by illegal operations at the mine, In other words, it is commonplace for mining companies to mine outside the parameters of their permits, and then retroactively allow for a permit revision with little to no repercussions. These extensions by OSM and foot-dragging on required revision data by the operator have allowed environmental damage to remain unabated several years after the fact. Again, we would hope that the Committee would be outraged that this is happening 30 years post-SMCRA.

Antiquated programmatic EIS

OSM, the regulatory authority in the non-primacy state of Tennessee, still measures its assessments of surface mining impacts on the environment with a document that was adopted in 1985. Since then a number of changes have influenced surface mining practices, and a large body of scientific research has informed state-of-the-art consensus on the impact of mining activity on headwater streams, and even entire regions downstream from major coal-producing states. It is time for this PElS to be updated, an opinion supported by SOCM as well as the Tennessee Department of Environment and Conservation. Currently the Department of Interior has, on two occasions, denied requests from the State of Tennessee to revise the state's 1985 programmatic EIS.

Destruction of headwater streams by mountaintop mining

The arrival of mountaintop mining to the coal industry's repertoire of extraction techniques has drastically changed the skyline of the Appalachians, it is estimated that over 2500 peaks in Appalachia have significantly altered forever as a result of mountaintop mining. In addition to its assaults on the homeland security of coalfield residents, this practice has eliminated hundreds of ephemeral, intermittent and perennial streams whose functioning is critical to water quality downstream, far from the .uplands where these environmental assaults are committed. The federal government's own Programmatic Mountaintop Removal and Valley Fill EIS speaks to the horrendous impacts of this practice, even though more conclusive research was aborted when the inconvenient truth of headwater losses began to emerge. We fail to understand why this destructive practice is still allowed. We urge the Committee to consider abolishing any mining practices that dumps mining wastes into streams, allows valley fills, or mines through streams.

Inadequate assessment of cumulative impacts

In reviewing mining permit applications we are consistently disappointed in the inadequate attention to cumulative environmental impacts of surface mining, especially mountaintop mining. OSM has failed to protect cumulative hydrologic integrity of the Appalachian coalfields by allowing valley fills that buried more than 1200 miles of streams and 1.5 million acres of forest vegetation that is inextricably involved in maintaining hydrologic balance. These activities have destroyed the functioning of whole aquatic ecosystems, including destruction of nutrient cycling services that headwater streams provide for downstream fisheries and other aquatic and riparian species.

Problems with public participation

Public participation in the control of surface mining is a core element of SMCRA, and, at the time, offered more opportunities for public involvement than perhaps any other environmental legislation. Under SMCRA, citizens are allowed to comment on proposed regulations, to obtain judicial review of final rulemaking, to comment on proposed state program provisions and obtain judicial review of decisions to approve them. They can review (and get copies of) permit applications, inspection

materials, and other information held by the regulatory authority. Citizens can comment on permit applications and request administrative and judicial review of permitting decisions. If SMCRA is violated, coalfield citizens can initiate complaints to federal authorities and accompany inspectors who investigate their complaints. If not satisfied with inspection results, citizens can call for a review of inspection and enforcement decisions. Until court decisions in the past four years discouraged such, citizens were allowed to bring civil actions to force coal operators to obey the law or to make regulatory officials do their jobs under the law.

Citizen participation since adoption of SMCRA has helped create a better system than the one originally on the books. But those of us on the front lines 30 years later still encounter delays in getting access to material, in some cases being required to file for information under FOIA. People seeking reparation for damage to their homes or water supplies have to negotiate the system with little assistance, and the results (as noted above) are often unjust and burdensome. SOCM and other coalfield groups have sought legal relief from intolerable environmental damage through NEPA and the Clean Water Act when it appears that no avenue is open via SMCRA. We would suggest that this in itself is a red flag and that the Committee needs to investigate how user-friendly SMCRA really is from the point of view of coalfield residents.

Coal: Poverty or Prosperity?

In the past, rural Appalachian communities were dependent on coal mining for jobs, and often dependent on the coal companies for virtually all economic activity. The advent of mountaintop removal mining has shifted the equation. Mountaintop removal is a mining technique designed, from the very start, to take the labor force out of the mining operation. What used to take hundreds of miners employed for decades, now takes a half dozen heavy equipment operators and blasting technicians a couple of years. According to the bureau of labor statistics, in the early 1950's there were between 125,000 and 145,000 miners employed in West Virginia; in 2004 there were just over 16,000. During that time, coal production has increased. This decline in the workforce continues today. Draglines and other advances in technology resulted in a 29% decline in mining jobs during 1987 and 1997, while coal production rose 32 percent during the same period.

All of this translates into profits for mining companies, all of which are headquartered outside of the region. Massey Energy, for example, is headquartered in Richmond, Virginia. As of January 31,2007, Massey Energy operated 33 underground mines and 11 surface mines in West Virginia, Kentucky, and Virginia. In 2006 Massey earned $2.14 billion in revenue, and CEO Don Blankenship received more than $10 million in compensation. Arch Coal, based in St. Louis, operates 21 mines in Appalachia and the West. In 2006, Arch brought in $2.5 billion in revenue. Peabody, also based in St. Louis, operates 40 coal mines in the U.S., Australia and Venezuela, and brought in $5.22 billion in revenues in 2006. A relatively new company, founded in 2002, Alpha Resources, has 27 active "surface" mines in Appalachia, as well as underground mines and road building operations to facilitate moving the coal out. Alpha is based in Abingdon, Virginia and brought in $1.96 billion in 2006 -all based on Appalachian coal. Despite these profits, particularly the wealth accruing to top executives, coal companies are quick to label property damage resulting from their activities "an act of God," thus avoiding any financial responsibility to the people who suffer the consequences.

To add insult to injury, in addition to the loss of jobs and exportation of profits, mountaintop removal effectively destroys the potential for many alternative economic growth options. In North Carolina and Tennessee mountain counties without coal mining, tourism income far outpaces the coal income in coal counties -an option unavailable to counties whose mountains and streams have been destroyed. Traditional wild ginseng gathering and small-scale agriculture are also obliterated when mountains are blown up. Not only must mountaintop removal be stopped, aggressive alternative, sustainable economic development options must be pursued. People of the coalfields need alternative means of livelihood that do not leave them dependent on the very coal companies that are destroying their communities, health and the land they need for long-term survival.

History demonstrates that long-term sustainable economic well-being eludes local economies tied to the one-time windfall of resource extraction, particularly coal. Coal producing counties are among the poorest in the nation. In a review of more than 300 studies of the economic impacts of mining industries on non-metropolitan communities, university researchers found that .roughly half of all published findings indicate negative economic outcomes in mining communities and the remaining half are split roughly evenly between positive and neutral/indeterminate outcomes. Positive outcomes are also more likely to come from the Western United States. More-

over, over half of all positive findings come from years prior to 1982. In virtually all other categories, the majority of the findings were negative. [1]

Given both the negative economic track record and the severe ecological impacts of surface mining, it is critical that government fully evaluate the expected local benefits and local costs to determine if mining in fact brings sufficient benefits to merit the decision to approve a mine.

The future of coal as a workable energy source

As discussion of a climate legislation moves onto the national political agenda, citizens groups-particularly citizens who have generations of experience with the true costs of coal are working to frame extraction issues as part of the larger debate. The SOCM Stripmine Issues Committee believes that those coalfield communities where coal is currently or has been extracted deserve the right to secure, sustainable jobs and energy sources. The committee further believes that while coal has provided a source of income and opportunity for generations, the price of coal does not expose the true costs of damage to the land, water and people of Tennessee. Additionally, as stated above, it is strongly held that failure of enforcement for thirty years has shown a not only a weak link in the system, but that it is also evidenced, that mountaintop mining can not occur without immensely devastating impacts to coalfield communities.

The SOCM Stripmine Issues committee concludes that "alternative" coal technologies—such as so called "clean coal", IGCC, and coal to liquids—are incompatible with a sustainable federal energy policy and a step backwards for the coalfield communities of Tennessee. Therefore every possible immediate action must be taken by the House Natural Resource Committee, in their review of SMCRA, to ensure that mountaintop mining and other forms of steep slope mining be immediately abolished, and more stringent enforcement be put in place.

Cumulatively, while we agree that some things are working, we also harbor a fair amount of discontent with how SMCRA is actually functioning, especially since the 25 th anniversary review in 2002. We believe that coalfield citizens have gone above and beyond the call of duty to keep OSM and coal companies true to the intent of SMCRA. There are many of us here in the coalfields who would be glad to share our experiences in more detail. We are interested to see how the Committee responds to our concerns.

Sincerely,

Cathie Bird, Chair
For the members of the SOCM Stripmine Issues Committee

---

[1] Freudenburg, William, University of Wisconsin-Madison, and Wilson, Lisa, University of California Santa Barbara, "Mining the Data: Analyzing the Economic Implications of Mining for Non-Metropolitan Regions," Sociological Inquiry, Vol. 72, No. 4, Fall 2002.

[A letter submitted for the record by Joyce Blumenshine, Peoria, Illinois, follows:]

Sent Via Email (Copy attached) August 3, 2007

To: The United States House of Representatives Natural Resources Committee

Regarding: The Surface Mining Control and Reclamation Act of 1977
Thirty Year Review

A sincere thanks to the Natural Resources Committee for the opportunity to comment on SMCRA and to have public concerns included in your review of of this essential legislation. In the thirty years since the enactment of SMCRA, a significant legacy of coal mining regulation outcomes is available for assessment. I would like to request your consideration of the urgent need to update SMCRA to include current scientific knowledge and demonstrated impacts of mining and the results of SMCRA regulations on land and water resources, and on the human communities in mining areas.

I would also request your consideration of specific issues I will detail below. These are based on my experiences during years of efforts with a volunteer citizen's group to have an auspicious area recognized as unsuitable for mining. I would greatly appreciate your attention as to how state agencies respond to Lands Unsuitable to Mine Petitions under SMCRA.

I hope you will not consider me presumptuous to say that coal mining issues affect the long-term sustainability and quality of life for human existence in locations that are in the area of mines. Coal mining greatly impacts water resources and the attributes of land that make it high quality agricultural land, or productive for other uses, or for such intrinsic values as mountains. In an era of climate change and continued population growth, true protection of water resources seems to me to be an essential focus of mining regulations. Living in the heartland of Illinois, I see protection of productive agricultural lands as another essential need. I contend that SMCRA regulations and/or enforcement are failing to protect water resources for future generations. I also contend that longwall mining has had, and will have hugely negative impacts on the productive quality of hundreds of thousands of acres of nearly flat agricultural lands in Illinois.

In Macoupin County, Illinois, flat lakes of stagnant water cover acres where prime ag land was once farmed. This is over four years after these lands were longwall mined. In my visits to Macoupin County, I have seen that longwall mining has not only affected farm fields, it has affected the rural quality of life. County roads are buckled with the earthquake type subsidence effects from longwall mining, and remain impassible and unrepaired years after the mining was done. Local traffic, schoolbuses, emergency vehicles, and other transportation had to use different routes. Homes on farm property owned by the coal company were vacated.

Subsidence damage to houses and farm buildings could be seen from public roads, and numerous subsidence damaged homes were mysteriously burned down. Loss of streams, springs, and other water resources because of longwall mining is a major concern for livestock farmers and residents. I ask for your every effort to stop the current expansion of longwall mining in highly productive agricultural lands. Just as there are locations that are suitable for coal mining, there are locations that should not be considered suitable for mining. Flat and nearly flat quality agricultural lands should be protected from longwall mining for their long term importance for crop production. Please update SMCRA with specific regulations pertaining to longwall mining that truly protect prime ag lands and water resources.

I am very appreciative that SMCRA included provisions for designating lands unsuitable for mining (LUMP). This is an essential provision. I ask that the ways in which states respond to Lands Unsuitable to Mine Petitions be investigated. My experience in Illinois is that the Office of Mines and Minerals holds LUMP petitions to an unreasonable standard beyond SMCRA and that the OMM fails to act fairly in responding to LUMP requests.

After Illinois OMM denied an application for a strip mine, a citizens group with which I volunteer filed a LUMP petition. Illinois OMM requested additional information regarding issues in our LUMP, and gave us additional time to respond. In then denying our petition, Illinois OMM stated that we untimely filed because the mine company had appealed the denial of their mining application. How can Illinois OMM not tell us outright that they had received an appeal of the mining permit, rather than leading us on in stating they were considering our LUMP and in requesting additional information from us over the course of a year after the mine appeal? This is either shoddy management or purposeful mismanagement to put citizens at a disadvantage. The Illinois OMM denial of our LUMP used the filing of the mine company appeal as a reason to declare our entire petition untimely filed a year after the mine company appeal. This also enabled the Illinois OMM to state that all the issues in our entire petition could not be refilled at any time.

My concerns regarding unreasonable standards for declaring lands unsuitable to mine is based on my experience. The Illinois OMM stated that our LUMP issues regarding impacts on private water wells and area water resources were "without merit" as it was not adequate to show, as our hydrologist report did, that Banner, Illinois, citizen water wells would be lost, but that we had to prove that no alternative water resource was available, such as the Illinois River or an aquifer near the river. The Illinois River is about one mile from the affected village water wells, as is the aquifer to which Illinois OMM referred. The village of Banner has no public water system and everyone depends on private water wells. Because SMCRA provisions for supplying water for lost private water wells, do not require to my understanding, installing a complete water system from an alternate source

a mile away, please see my citizen quandary at the type of standards Illinois OMM imposes on LUMP applications.

In your review of SMCRA, I would like to request that some economic assessment be made of the real costs of mining to governmental entities and public taxpayers in terms of lost or polluted water resources, impacts on public health and well-being, and the greater long-term issues of what kinds of mining allows sustainable use of lands for future generations, and what coal mining leaves incapacitated land. I hope you will consider the probability that if the complete costs of coal mining are paid for by the companies that mine, a better balance in turning society toward a variety of sustainable energy sources could be assisted because coal would not be so cheap.

Thank you for your consideration.

Sincerely,

Joyce Blumenshine
2419 E. Reservoir
Peoria, IL 61614-8029
309-688-0950
joblumen@yahoo.com

[A letter submitted for the record by Julia Bonds, Rock Creek, West Virginia, follows:]

August 7, 2007
Comments From Julia Bonds for August 8 Congressional Oversight Hearing
Committee on Natural Resources of the United States House of Representatives
"The Surface Mining and Reclamation and Control Act of 1977: A 30th Anniversary Review

Introduction: In giving my comments to this 30th anniversary review, I feel like an abused wife and mother, who the judge (Congress) has given her abusive husband 30 years parole to prove that he won't abuse his wife and children. I was present at the oversight hearing on July 25 held in Washington D.C. At that hearing, I felt every blow from every lie that the coal industry and the Regulatory Agency were telling. The coal industry is still the abuser and is still getting away with the abuse. Our politicians are ignoring our cries for help.

WV DEP means West Virginia Department of Environmental Protection

Some comments were taken from the August 2, Comments I gave to WV DEP Permit Hearing ...Eagle 2... S-3028-05 Surface Mine permit...mountain top removal/peak reduction permit held at Clear Fork Elementary School

This permit S-3028-05 should be denied. How many mountains do we have left to mine?

The West Virginia Department of Environmental Protection has failed in public involvement during the permit process. The citizens/residents are last to know when a permit is applied for and these citizens should be part of the permitting process from the first day the permit is applied for.
WVDEP and Office of Surface Mining has failed in requirements of post mine land use. SMCRA has failed to be enforced and SMCRA laws are inadequate. If SMCRA is working then why does the West Virginia Department of Environmental Protection have thousands of complaints from citizens and residents that live in coal mining communities?
There are areas of this mountain, Coal River Mountain that will be lowered hundreds of feet, even if they pile the waste and debris back on top. This mining plan should require a variance, which, in turn, would require a meaningful post-mining land use plan.

Rowland Land Company and Massey Energy are permanently destroying a sustainable and profitable use of the land while they provide no economically beneficial post-mining development plans. The landowners (particularly absentee landowners with no stake in the health and welfare of local communities) are not allowed to permanently destroy the landscape and the economic viability of a community to make a blood money from mining. The law is clear, the regulatory agency is supposed to be enforcing SMCRA, not making decisions based on the wishes of wealthy landowners. SMCRA deals directly with the economic impacts on communities. We could have a few jobs for less than 10 years or many jobs forever and still have

productive land. SMCRA laws are NOT sufficient to protect the people, the wildlife and the environment.
Back when there were only a few open areas in a mostly unbroken forest, they could have made a bad, but straight-faced argument that creating open space would benefit some wildlife. Two scientific studies came out in the last two years showing that there are very few large blocks of mature forest remaining in the coalfields as a result of surface mining. These are recent studies and this plan would irreparably fragment one of the largest blocks remaining in the coalfields. "It is a sin to make a living by bombing God's creation, blasting your neighbors, and poisoning your neighbors air and water. That's called blood money. So please stop bombing your neighbors for greedy, evil coal companies.

You can't put a mountain back; do you think that you can do a better job than God?
This is a big permit operated by an outlaw company that is the worst of the worse. Over 4000 clean water act violations, $2.4 billion lawsuit by federal government, etc. There's no reason to think Massey will comply with the terms of this permit.
After 30 years after passage of SMCRA, the West Virginia DEP has shown that the citizen involvement portion of SMCRA doesn't work. These conferences are just a box for the DEP to check off. Consistently, the DEP hears overwhelming community opposition, ignores it, and grants the permit anyway.
This mountain and community can be sacrificed, destroyed forever for a temporary polluting energy source, or it can be preserved and provide energy forever.

WV DEP, SMCRA, OSM has failed to protect Ginseng, a protected species. Where does the West Virginia Department of Environmental Protection or West Virginia Division of Natural Resources set standards and guidelines for Ginseng, Black Cohosh, and Goldenseal protection? Where is the guideline protection for the undergrowth in SMCRA? SMCRA has again failed to be strong enough to protect the great diversity of plants in central Appalachia. This agency is breaking its own mandate, to protect the citizens, and the environment. WV DEP and OSM and SMCRA, section 10 states that the land mined must be able to sustain, and or be as productive after the mining as it was before the mining. Show me where the Ginseng is? Where is the undergrowth? Ginseng is worth over $300 a pound. That is the mandate of the agencies. IT doesn't matter that the exact specification in the regulations doesn't include them by name. IT is the law. Enforce the law.

The WV DEP, SMCRA and OSM have failed to protect the wild life habitat and the West Virginia State Animal, the Black Bear. The animals habitat is being destroyed daily, the bears, snakes and all critters that lived on this mountain is coming into our homes and yards. DNR and Fish And Wildlife agency has filed to demand a set of protective guide lines and enforce those guide lines to protect the wild life, their homes and there fore has put humans in danger as well.

Rowland Land Company and others land companies like them is as much to blame as the coal companies. They are getting rich form our suffering. They stole and conned this land from our ancestors over a century ago. If coal is to be mined the royalties should be going to the citizens in the communities. The land companies are putting citizens and communities at risk. Rowland Land Company and other absentee landowners don't have the right to lower my property value, damage my property or poison me in order to enrich themselves.

The WV DEP, OSM and SMCRA have failed to protect the people and their property from irresponsible landowners, coal barons and irresponsible engineers. The West Virginia DEP had conducted a study of rainstorm run off called FATT. This study says the surface mining increases rain event runoff anywhere from 5% to 52%. The WV DEP is ignoring it's own study.
WVDEP and OSM are ignoring the cumulative effect on the streams, citizens and communities. Again the laws in SMCRA are not sufficient to protect the land and the people in mining areas. Regulatory agencies have failed to conduct water analysis on cumulative effects of huge amounts of mountains and forests that have been bombed. This effect of this mine when taken in with other mining in the Coal River Valley will wash communities from Sycamore, Dorothy, the back street and lower end of Whitesville and Sylvester off the face of the map. Head of West Virginia Department of Environmental Protection, Stephanie Timmermeyer testified that her regulatory agency is controlling the effects of strip mining and that is not true. Ms. Timmermeyer should have brought all the citizen's complaints with her that the residents living near the mining sites have had to endure and has called her agency expecting help. If SMCRA is working then why is there so many citizens' complaints? The only solution to control the damages of strip mining in the steep slopes of central Appalachia is to ban steep slope strip mining in Appalachia.

The aquifers in mining communities in Appalachia are being destroyed and adversely affected by coal mining companies and coal company friendly regulatory agencies. Mountaintop Removal is also Aquifer remover. The "Fox is guarding the hen house here in Appalachia". It is not only mountaintop removal but also aquifer removal here in Appalachia. The mountains of Appalachia are where a large part of the streams of the east coast are born.

Engineers are as complicit as the mining and land companies. Just because you can do something doesn't mean you should do it. They accept blood money to come up with the conclusion the coal industry wants so that the coal company can destroy us and poison us. IF engineers are doing their job of protecting people and environment then why is the West Virginia DEP's office full of complaints form blasting and blast damages, fly rock complaints from coal dust and rock dust, complaints from lost wells, polluted water, flooding, valley fill erosion, stream sedimentation and from cemeteries being mined through. I am already feeling the effects and the blasting from the Edwight Surface mine over 6 miles away, this proposed mine will be closer and will directly affect me.
"It is a sin to make a living by bombing God's creation, blasting your neighbors, and poisoning your neighbors air and water. That's called blood money. So please stop

bombing your neighbors for greedy, evil coal companies.

You can't put a mountain back; do you think that you can do a better job than God?

Worst of all our politicians have failed us. They are nothing more than puppets for the coal industry. Congressman Rahall is one of many that is aiding and abetting the coal industry in domestic terrorism. AS for the uproar about animal cruelty, some politicians, including Congressman Rahall and the coal companies are no better than Michael Vick, the only difference is Vick is a different color and isn't a corporate terrorist like the coal industry. The bears and wild life are being blown up on theses strip mine sites; their habitat is being destroyed. These animals are coming into our homes because they have no food and no home.

If these so called reclaimed strip mine sties are so great then why doesn't the owner of Rowland Land Company and other absentee land company owners live on these sites? Better yet, why don't the engineers and their families that built theses valley fills and wastelands live at the toe of a valley fill? Why doesn't Congressman Rahall, or President of the Coal Association live there? Lets put the Governor's Mansion and the State Capitol Complex at the toe of a Valley fill and on top of these sites. Why not?
If theses sites are so great then where are the developers that want to build on theses sites? Where are the housing development companies that want to build?? The housing development builders are building in the New River Gorge area, where the mountaintop hasn't been blown up. At least 95% of the mountaintop removal sites are flat and ready for development, where are the economic development companies? Where is the prosperity? The coal producing areas of West Virginia is the poorest communities. Let develop the sites we have before another inch is mined. Where is the economic development on the 400,000 acres already flattened?
Again, all regulatory agencies and SMCA law fails to address the cumulative effects of strip mining in Appalachia. This must be addressed. Why won't the law or regulatory agency address this issue? Is it because of what the coal friendly politicians and government agencies will find?

At this permit hearing I listened to people talk about the blasting that has cracked their homes, to people who's water wells were sunk by blasting and polluted by the flooding from the denuded landscape form strip mining. People that have had valley fills come into their back yards like Sharon Bailey. People that can't sit outside and whose homes are covered in silica dust, coal dust and can't breathe from the after effects of the explosives used in the strip mining.
I tried to get a transcript of the citizen comments at this hearing from the West Virginia DEP, but there was not enough time to obtain it before the dead line. I can get it to your committee members in the next 2 months, if you will accept it. I think it is the best example of what is wrong with surface mining and SMCRA. IF you truly want to know the people that live near theses sites will tell you. Do you want to know?

Julia Bonds

Julia Bonds

P.O. Box 135
Rock Creek, WV 25174
Coal miner's daughter and granddaughter
8th generation resident of Coal River Valley in West Virginia
Proud mountaineer and hillbilly
Save the Endangered Hillbilly... Stop Mountaintop Removal

[A letter and exhibits submitted for the record by Beverly Braverman, Executive Director, Mountain Watershed Association, dated August 3, 2007, follow:]

Mountain Watershed Association
P.O. Box 408
Melcroft, PA 15462

August 3, 2007

Chairman Nick Rahall
House Natural Resources Committee
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Rahall:

We appreciate the opportunity to submit formal comments for inclusion in the record in response to the House Natural Resources Committee hearing concerning the SMCRA held by you on July 25, 2007.

White SMCRA was written to answer the promise of protection in the coalfields, implementation has fallen short. Some of the successes have been restoration of some abandoned mine lands, provision for running state programs under Title IV, and Appalachian Clean Streams Initiative grants to watershed groups doing reclamation in their communities.

These successes, however, are overshadowed by the lack of enforcement of the purpose and intent of the Act. The gradual erosion of the Act by State programs refusing to follow the laws set forth about blasting, strip mining, and public participation has created a situation where those who supported passage barely recognize "the promise" they were given in the Rose Garden those many years ago.

The lack of implementation and enforcement of SMCRA by the federal and state government has seriously weakened the needed benefits and controls that led to its passage in the first place. The dearth of oversight of state promulgated coal-friendly regulations that fly in the face of the law has contributed to the failure of the Act to protect our environment, our quality of life, and our communities.

Enclosed for inclusion in the record is a booklet (Exhibit A) called the True. Cost of Coal, which shows the degradation and destruction resulting from weak enforcement of SMCRA and passage of regulations that add to the emasculation of the law. This pictorial record includes subsided streambeds, which have occurred as a result of surface-effects of underground mining, an area that SMCRA was meant to control. Also, included are pictures of mountain top removal, which is totally outside the realm of the law. Many valley fills are in complete violation of the Act. Home, highway, water line impacts caused by longwall mining are also surface effects of underground mining that the Act was meant to control.

In addition to these surface impacts of underground mining, OSM has allowed the destruction of homes on the Historic Registry. The tragic story of the Thralls House is a shameful abrogation of federal control over the coal industry.

The promulgation of coal-friendly regulations have upheld the further weakening of the Act. States like Pennsylvania now permit the allowance of unacceptable mitigation of surface effects, such as in Exhibit B, a picture of a dry streambed and pipes carrying the water, will not be overthrown through federal oversight under SMCRA. So far, they have been correct in this analysis. OSMRE has been MIA.

There is a belief that citizens in the coalfields can bear the burden of continued damage to their homes 'from strip mining. SMCRA was passed in major part to shift the burden of coal mining from citizens living in the coalfields to the people responsible for the burden and profiting from the burden, the coal companies. This burden has not been shifted. Living in coalfield communities means that any day a permit may be issued beside your home that will cause excessive amounts of dust and noise to become part of your daily life. It means that any day, you may wake up and not have water sufficient in quantity and quality to get you through the day OR you may not have water at all. You are then at the mercy of the coal company to provide you with this most precious resource.

Blasting damage continues to plague citizens despite the position in SMCRA that NO DAMAGE, NOT EVEN COSMETIC DAMAGE, is to be allowed. In Pennsylvania you are expected to believe that blasting did not cause the damage to your home despite the reality that the damage was not there prior to mining as shown in your pre-blast survey but is there in the post blast survey—You are told that the problem of blasting damage is a civil matter between the homeowner and the coal

company. The PA Department of Environmental Protection states "it has no authority to require the company to compensate the homeowner for damage." Where is federal oversight under SMCRA at this point? The burden of blasting damage caused by strip mining has not been lifted from the citizens of the coalfields. Most of the communities where mining takes place are economically struggling and underserved. To expect the people living there to hire an attorney to protect their interests or pursue a lawsuit for damages from blasting is totally unacceptable and unreasonable. They cannot afford to hire an attorney. But, then, that is the idea, is it not?

Another purpose of SMCRA was to improve disbursement of information, particularly accessibility of permit applications. This would be a great idea if OSM's website were not opaque, that is, if it was up to date with pertinent information. Further, if OSM oversaw the state's provision of information to citizens, it would see that they are being charged for copies at a high rate; permit applications are deemed complete even if they are only administratively complete, not technically complete; and permit information is submitted in a piecemeal fashion, which makes citizen review an ordeal.

Inadequate bonding is another ongoing nightmare for communities. On August 2, 2007 the United States Court of Appeals for the Third Circuit gave a victory to Pennsylvania's environment and economy by ruling in favor of a coalition represented by Citizens for Pennsylvania's Future (PennFuture) that the Commonwealth of Pennsylvania must require the state's coal operators to post bonds to cover the entire cost of environmental cleanup. The case began in December 2003 FOR THE SECOND TIME, when PennFuture filed a lawsuit on behalf of Pennsylvania Federation of Sportsmen's Clubs, Pennsylvania Council of Trout Unlimited (formerly PA Trout), the Pennsylvania Chapter of the Sierra Club, the Tri-State Citizens Mining Network (now known as the Center for Coalfield Justice) and the Mountain Watershed Association against both the federal and state governments for their failure to protect Pennsylvania's environment from damage caused by mining operations, including acid stream pollution.

I am enclosing this decision (Exhibit C), which indicates another serious problem with how SMCRA is enforced. It is disheartening that our government officials had to be taken to court and forced to do the right thing. With an existing $15 billion backlog of old mine damage, it is crystal clear we need to take action to stop the problem from getting any worse. But the state adopted policies that slashed the amount of revenue generated by its reclamation fee, and has even proposed to eliminate that fee entirely. The court's ruling makes clear that those decisions took the state in the wrong direction.

We thought the recognition of citizen suit provisions and public participation by Congress was a-great step forward. But, how much damage has gone uncorrected in the years our bonding suit struggled through the courts? It certainly is much better for citizens and the environment if the law is enforced in the first place.

Public participation provisions in the Act have been emasculated by state practice. Attached is an exchange of letters between citizens and the PA Department of Environmental Protection concerning the practice of holding public meetings in the middle of the day when most working citizens cannot attend. (Exhibit D) Further, public notice has become a farce as notices are placed in papers where few people in the proposed affected area are among the paper's circulation, the meeting is held in a neighboring township and the township supervisors of the proposed affected township are not notified. The request for evening meetings (even those requests made by the township supervisors) are rejected by the state regulatory agency based according to them on budgetary constraints. The Congressional provision for public participation has fallen victim to the budgetary concerns of the state. Somehow, I do not think that is what Congress had in mind when they provided for this right.

There are numerous other concerns. However, I am certain that my comments are not the only ones that will be submitted for inclusion in this record. I leave it to others to continue my lament.

Very truly yours,

Beverly Braverman
Executive Director, Mountain Watershed Association
Home of the Youghiogheny Riverkeeper®
Member, Waterkeeper™ Alliance Chair,
Center for Coalfield Justice Pennsylvania Board Representative,
Citizens Coal Council
(724) 455-4200
on behalf of:

Jim Kleissler, Executive Director,
Center for Coalfield Justice
(724) 229-3550

Krissy Kasserman
Youghiogheny Riverkeeper®
(724) 455-4200

Exhibit A

The True Cost of Coal

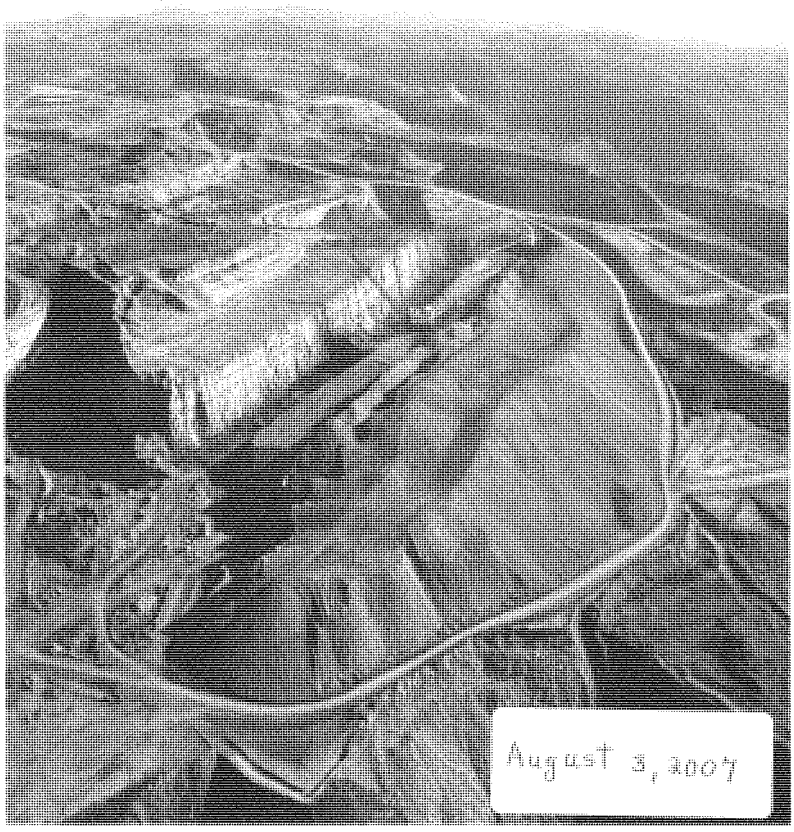


photo courtesy of Ohio Valley Environmental Coalition, www.ohvec.org.

If we consider *ALL* the environmental and health impacts of the entire coal cycle, what would be the real cost per kilowatt-hour?

SLUDGE and **SLURRY** are liquid byproducts of washing coal, and are frequently stored in **IMPOUNDMENTS**. When these impoundments are breached by faulty construction or heavy rains, the results are devastating.

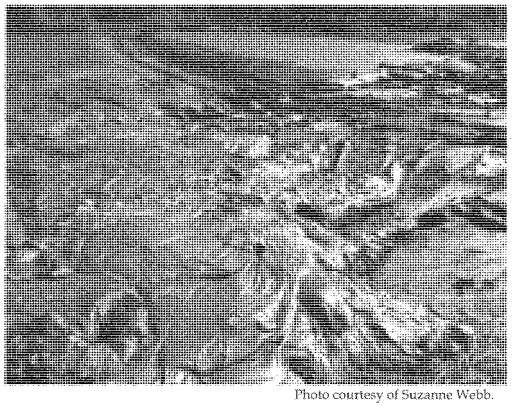


Photo courtesy of Suzanne Webb.

Pictured at left is coal sludge from an October 2000 slurry impoundment break in Inez, Kentucky. This spill allowed 250 million gallons of sludge and slurry to be discharged into area streams. To put that into perspective, consider this: The Exxon Valdez spill discharged 11 million gallons. The Inez, KY, disaster fouled water supplies and killed aquatic life for over 100 miles of stream, and also left sludge up to 15 feet thick in places.

Left: **VALLEY FILLS** (also called 'head of hollow' fills) are constructed to dispose of the massive amount of 'overburden' created by mountaintop removal mining.

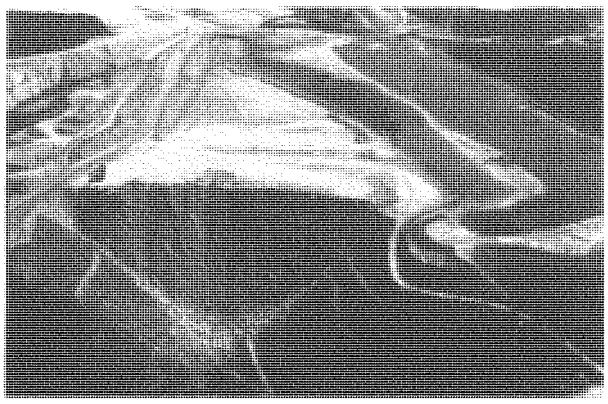
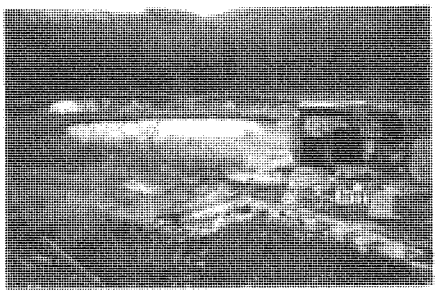


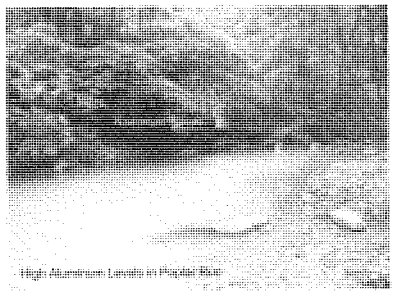
Photo courtesy of Charlie Archambault

'Overburden' generally refers to the material that comprised the mountaintop before it was blasted to remove the coal. Estimates of the miles of streams buried by valley fills in West Virginia alone are between 500 and 1,000 miles.

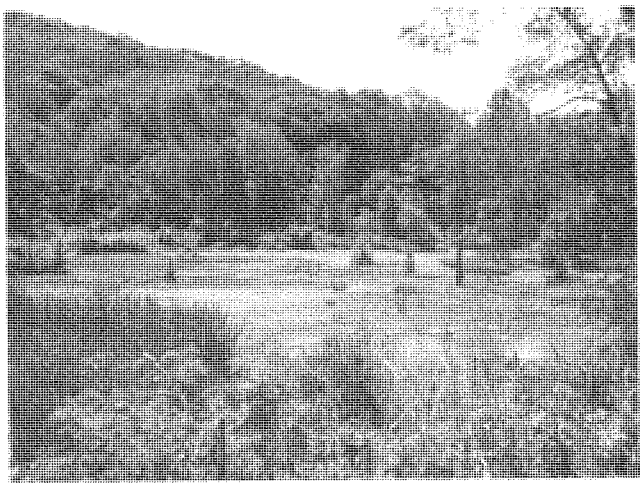
MOUNTAINTOP REMOVAL MINING (cover) has turned tens of thousands of acres of the Appalachian mountains into barren wasteland, eliminating vast swaths of some of the most productive and diverse temperate forest on Earth. Pictured on the cover is a mountaintop removal mine near Kayford, WV.

These ruined landscapes are **ABANDONED MINE SITES.** Abandoned mine sites are areas that were never reclaimed following mining activity, and often have devastating effects on water quality in adjacent areas, and also can contain hazards that frequently cause injury or death among those who stumble upon them. In Pennsylvania alone, more than 4,000 miles of streams are contaminated from pollution discharged from abandoned mines. More than 1.4 million Pennsylvanians live within one mile of an abandoned mine site.



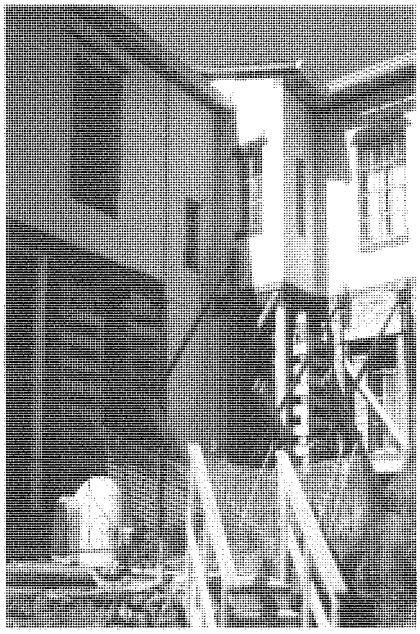


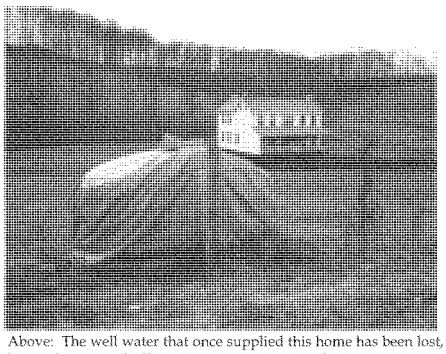
Above: Called the Marsolino Site, this area is responsible for the toxic level of **ALUMINUM** in Newmeyer Run, a tributary of Poplar Run in Fayette County, PA. This site has destroyed six miles of a former high-quality cold water fishery.



Left: This **MINE DRAINAGE** bog in Fayette County, PA, is responsible for 40% of the total pollution load in Indian Creek.

Photos courtesy of Mountain Watershed Association, www.mtwatershed.com





Above: The well water that once supplied this home has been lost, hence the 'water buffalo' that sits on the heavily damaged property. A 'water buffalo' is a plastic water tank that is supposed to serve as a temporary water supply. They dot the countryside in southwestern Pennsylvania.

LONGWALL MINING is also known as full extraction mining, as it removes all of the coal beneath the surface. It causes subsidence that damages surface structures, including homes. It also causes wells and springs to dry up or turn foul—hence the "water buffaloes," plastic water tanks dotting the countryside in southwestern Pennsylvania. Creeks often dry up as well, but the unpredictable nature of longwall subsidence can sometimes turn formerly dry fields into wetlands.

Left: This Greene County home, built in 1939, was on the National Register of Historic Places, but that didn't save it from being undermined and severely damaged.

The site pictured above was formerly a pond, but has drained as a result of longwall mining subsidence. Notice the heron standing in what formerly was an aquatic habitat.

All photos courtesy of Mimi Fillipelli, Tri-State Citizens Mining Network. www.tristatecitizens.org

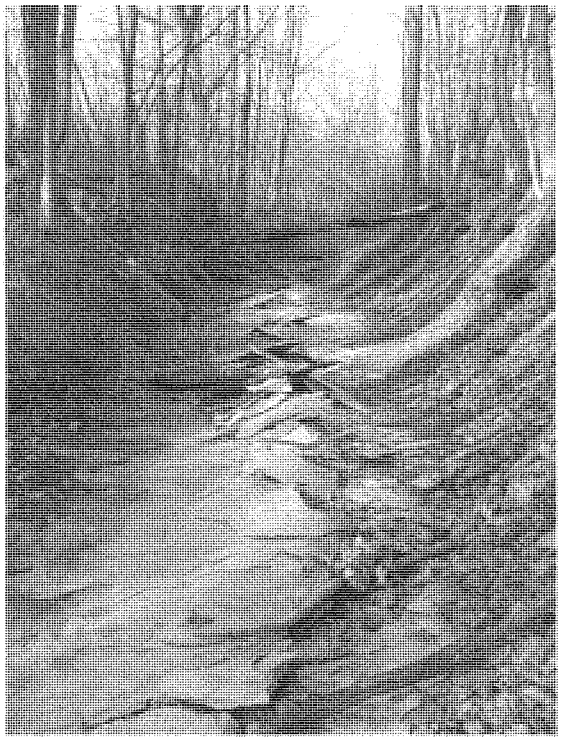


Photo courtesy of the Raymond Proffitt Foundation, www.rayproffitt.org

What about the water?

The disruption of water supplies is a serious side effect of longwall mining. In Washington and Greene Counties, PA, many residents operate small farms and rely on wells, springs and streams to provide water.

Pictured to the left is an unnamed tributary to Dunkard Fork in Greene County after undermining took place. The streambed has been severely damaged and the stream de-watered due to longwall mining subsidence.

The Pennsylvania DEP is supposed to mandate replacement of water supplies for current and foreseeable use. In reality, water supplies aren't protected for foreseeable use, leaving future generations with no assurance of water access.

Notice something odd about this house? It's up on stilts awaiting a new foundation, as the former foundation was destroyed by mining subsidence. The pasture turned into a bog, but the well water was lost. Muddy water everywhere but not a drop to drink....

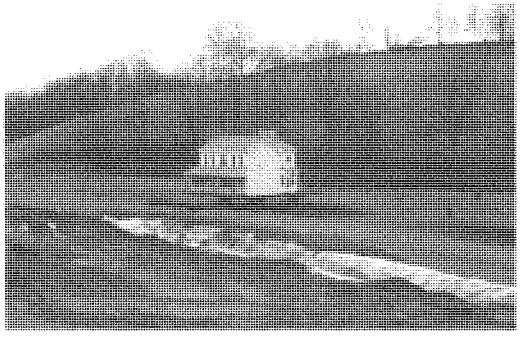
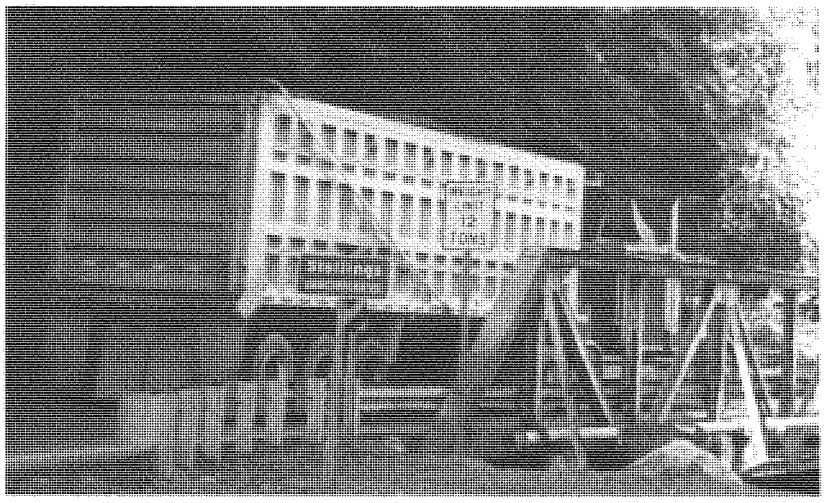
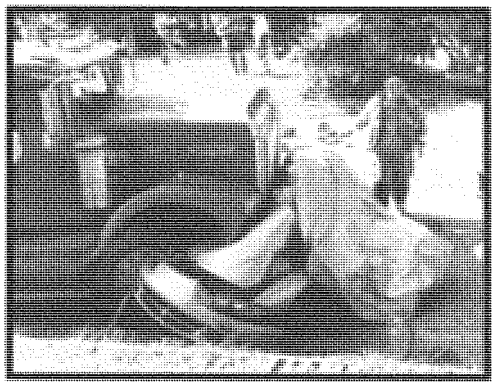


Photo courtesy of Tri-State Citizens Mining Network

COAL TRUCKS typically weigh in at over 100,000 pounds and create a hazard on the roads in coal country. Taxpayers often bear the brunt of the expense to maintain roads that were frequently not constructed to withstand heavy coal truck traffic. For those who must share the narrow, winding roads with coal trucks, sometimes the price is much higher.



Photos courtesy of OVEC

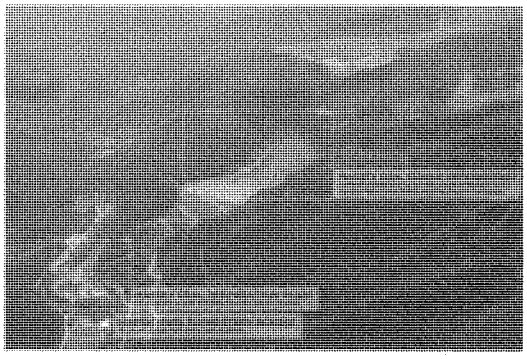


Left: On September 6, 2001 in Hernshaw, WV, Jimmy Nelson and his sister Mary Justice were killed in this collision with a coal truck.

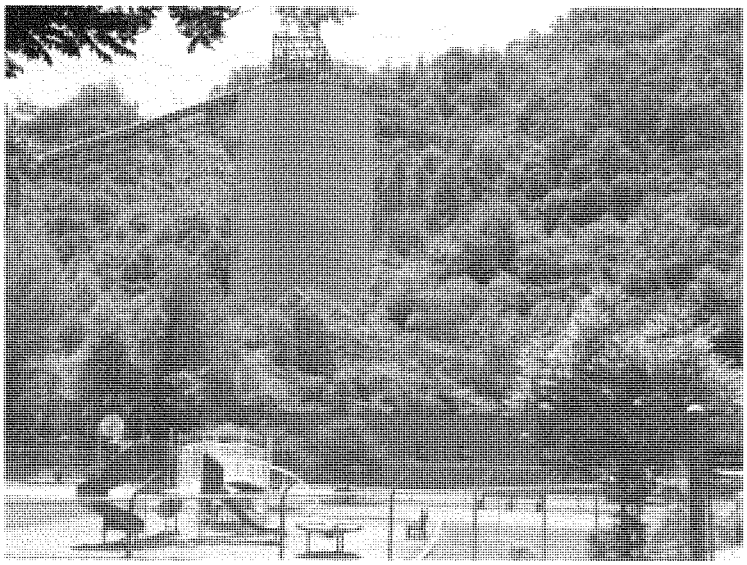
Consider this: According to the Ohio Valley Environmental Coalition, a 100,000 pound truck with unadjusted brakes travels 25% further after the driver steps on the brakes than an 80,000 vehicle will. A 120,000 pound truck travels 50% further.

After coal departs a mine, it must stop at a **PREPARATION PLANT** en- route to a power generating facility.

Residents living near prep plants must endure a constant barrage of dust and other chemicals emitted from the prep plant, as well as continuous truck and train travel as the coal is hauled in and out.



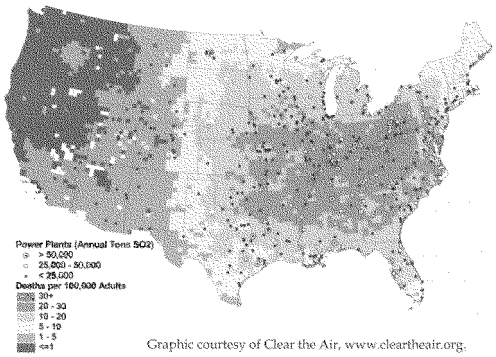
Right: An aerial view of the prep plant, the sludge impoundment and mountaintop removal mine immediately adjacent to Marsh Fork Elementary, Sundial, WV.



Above: This coal processing plant is located 150 feet from Marsh Fork Elementary School in Sundial, WV. In March of 2006, independent experts confirmed the presence of coal dust in the school.

Photos courtesy of the Mountain Sustainability Project, www.coalfieldsustainabiliy.org

POWER PLANT POLLUTION affects everyone in the eastern US, but it disproportionately affects the very same populations that pay the price of mining impacts because it's cheaper and easier to build power plants near the source of coal.



Graphic courtesy of Clear the Air, www.cleartheair.org.

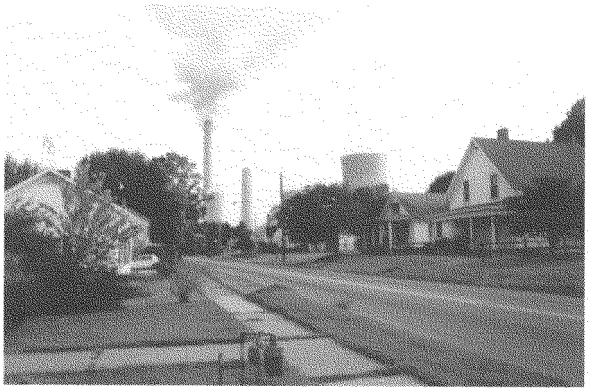
Of the electric industry total, coal-fired power plants produce **52%** of our nation's electricity, along with:

- **92%** of the **nitrogen oxides** that worsen asthma and lung disease and cause smog
- **94%** of the **sulfur dioxide** that worsens asthma and lung disease and causes acid rain
- **86%** of the **carbon dioxide** that is the number one cause of global climate change
- Most of the **fine particulates** that trigger asthma and heart attacks
- **Essentially all** of the **mercury** that impairs neurological development.

Pictured is American Electrical Power's Gavin coal-fired power plant on the Ohio River near Cheshire, OH. The Gavin plant frequently sends blue sulfuric clouds down into the neighboring town of Cheshire.

Photo courtesy of Elisa Young, Ohio Sierra Club and Southwings, www.southwings.org.

Pictured is the town of **Cheshire, OH** with the James M. Gavin coal fired power plant in the background. Blue sulfuric clouds descend from the plant and cause eye and skin irritation, as well as headaches, sore throats, and white burn marks on the lips and tongue. In 2002, in response to a lawsuit filed by village citizens and a declaration from the EPA that the Gavin plant violated the Clean Air Act, AEP bought out the residents of Cheshire for $20 million rather than clean up the plant. Residents who were not part of the buyout continue to live in the shadow of the plant and with the air



POWER PLANT WASTE is perhaps the least recognized of the problems associated with coal use. Power plant waste is the ash left over from burning coal. In volume, it is second only to household and commercial waste. It contains toxic heavy metals and is largely unregulated, often disposed of in unlined pits or old surface mines. Contamination of the area groundwater is a serious concern. Pictured below is the outfall from a slurry ash pipe in New Mexico.

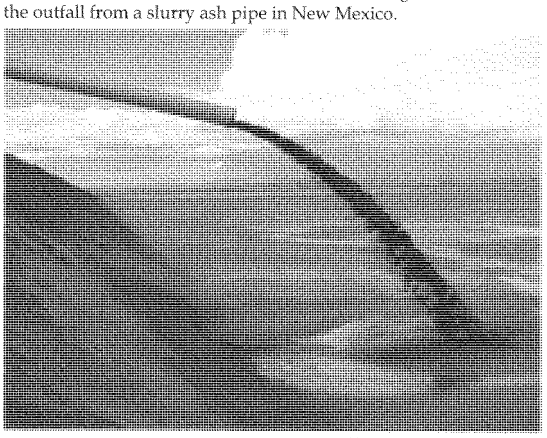


Photo courtesy of Clean Air Task Force, www.catf.us.

Maple trees, like those pictured below, are the major canopy tree in the Appalachians, and are suffering some of the most dramatic consequences of **ACID RAIN**. These maples are so weak due to the effects of air pollution that they are susceptible to a host of other diseases. Eastern forests are dying off rapidly because of air pollution from sources including coal-fired power plants.

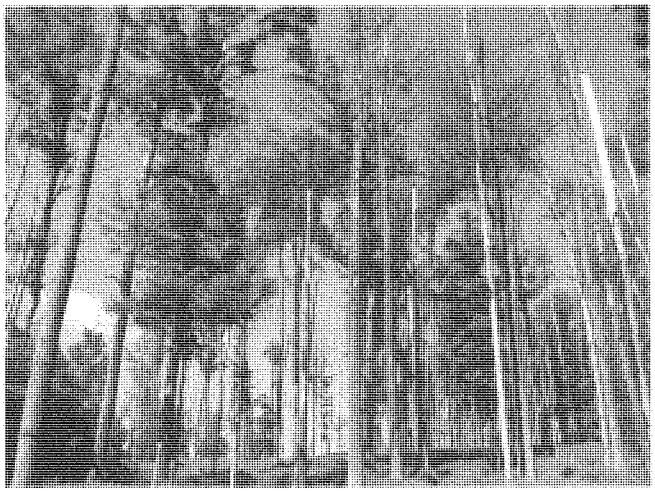
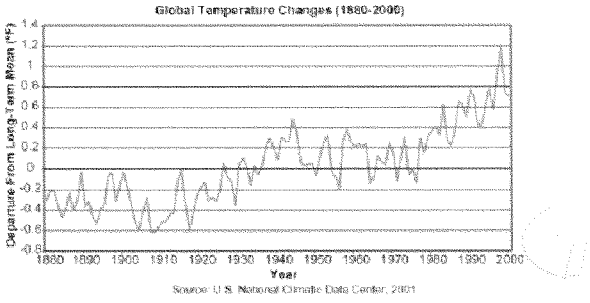


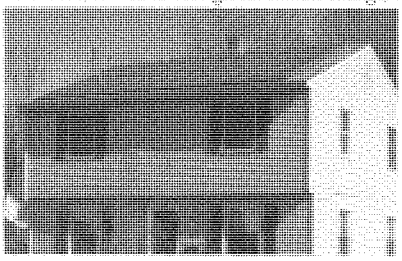
Photo courtesy of Scott Bailey, US Forest Service

GLOBAL CLIMATE CHANGE is the end result of our overuse of coal as a 'cheap' energy source. We've passed the time when even the most ardent suitors of the fossil fuel industry still question the science. The effects are becoming noticeable, especially in the arctic regions. Not only are the computer models' unpleasant predictions coming true, but it's happening faster than expected. Recently, a sharp jump in measurements of atmospheric carbon dioxide, unexplained by emissions releases, has scientists worrying that a positive feedback mechanism may be operating. Although there are other sources of CO2, by far the largest source of atmospheric CO2 is coal fired power plant emissions.



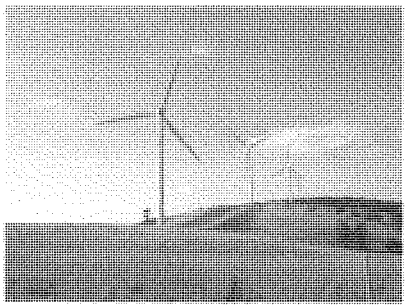
Source: U.S. National Climatic Data Center, 2001

ALTERNATIVES to coal-fired power include conservation, increased efficiency, and solar and wind power. If we are to stop the impacts of the entire coal cycle on both our communities and the environment, as well as curb global climate change, we must begin embracing alternatives now.



Solar power is one clean solution. The price of home installation of solar panels is decreasing, and living 'off the grid' is now a reality for many families. This home near Philadelphia, PA has been fitted with solar panels.

Photo courtesy of Celentano Energy Services



This **windfarm** is located in Mill Run, PA. The estimated energy output of the ten turbines at this site is enough to supply the yearly energy consumption of 5,700 homes.

Photo courtesy of Community Energy, www.communityenergy.biz

YOU can help reduce the dangerous effects that the coal cycle has on communities and our environment while reducing your electric bill. Consider taking some of these small steps:

- Install compact fluorescent light bulbs in your home. These bulbs use 1/4 the energy and last up to 7 times longer!
- Take advantage of the sun! Air dry your clothes on a line outside rather than in the dryer on warm days.
- Only run your dishwasher when it is full and select the 'energy save' option to air dry your dishes.
- Personal computers use about the same amount of energy to startup as they use when they are on for about two seconds, so turn off the monitor if you aren't going to use your PC for more than 20 minutes, and turn off both the CPU and monitor if you're not going to use your PC for more than 2 hours.

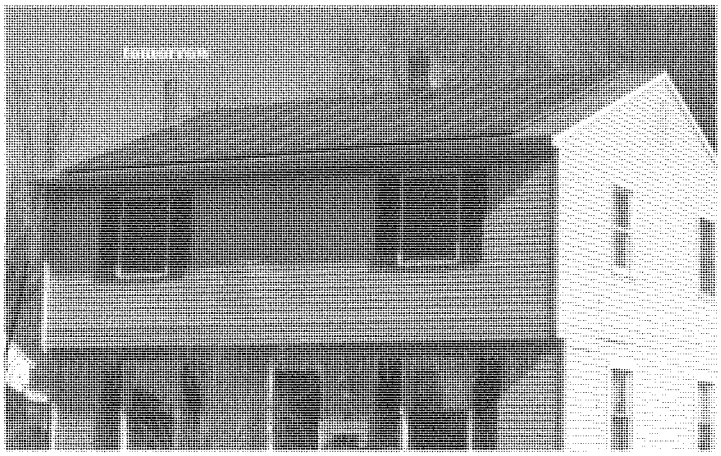
Join us as we work to see that power is produced and consumed responsibly in the future, and as we work to conserve energy today. Doing so will drastically reduce the impacts of the coal cycle on our environment and on communities.

The power is, quite literally, in your hands.

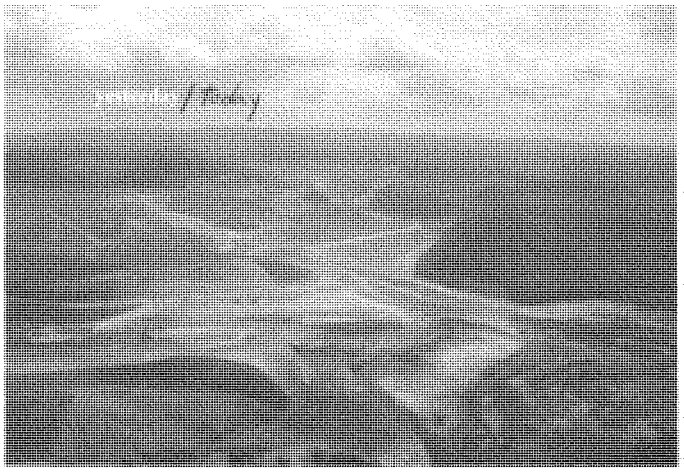
Mountain Watershed Association
PO Box 408
Melcroft PA 15462
www.mtwatershed.com
724.455.4200

Center for Coalfield Justice
PO Box 1080
Washington PA 15301
www.coalfieldjustice.org
724.229.3550

The alternatives-solar power is one clean and hopeful solution. It's expensive now, but with greater use the price will decrease.



The Gardners' house near Philadelphia, refitted with solar panels thanks to Ron Celentano of Celentano Energy Services

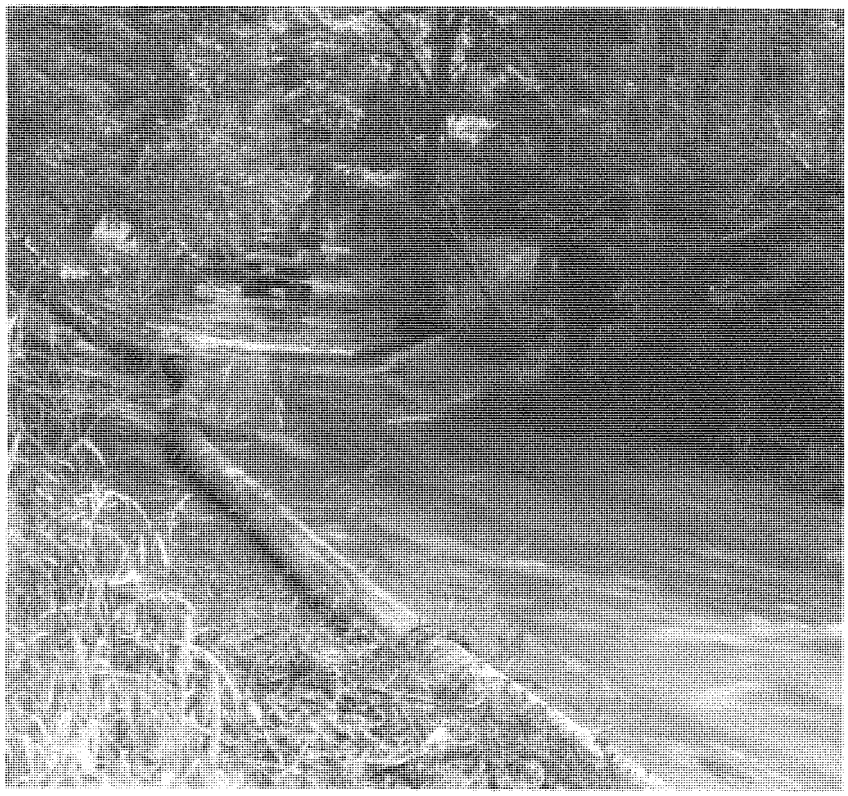


Seemingly endless mountaintop mining in southern WV thanks to Vivian Stockman

Mountain Watershed Association
PO Box 408
Melcroft PA 15462
www.mtwatershed.com
724.455.4200

Center for Coalfield Justice
PO Box 1080
Washington PA 15301
www.coalfieldjustice.org
724.229.3550

Exhibit B



South Fork Stream
Greene County
June 2007

Is This What They Call Mitigation?

Exhibit C

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1780

PENNSYLVANIA FEDERATION OF
SPORTSMEN'S CLUBS, INC.;
PENNSYLVANIA CHAPTER SIERRA CLUB;
PENNSYLVANIA TROUT, INC.;
TRI-STATE CITIZENS MINING NETWORK, INC.;
MOUNTAIN WATERSHED ASSOCIATION, INC.,

Appellants

v.

DIRK KEMPTHORNE,* SECRETARY,
UNITED STATES DEPARTMENT OF THE INTERIOR;
BRENT WAHLQUIST, ACTING DIRECTOR,
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT;
BRENT WAHLQUIST, REGIONAL DIRECTOR,

---

*Pursuant to Fed. R. App. P. 43(c)(2), Dirk Kempthorne is substituted for his predecessor, Gale A. Norton, as Secretary of the Department of the Interior. Brent Wahlquist is substituted for his predecessor, Jeffrey D. Jarrett, as Acting Director, Office of Surface Mining Reclamation and Enforcement.

OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT;

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Intervenor in D.C.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 03-cv-02220)
District Judge: Honorable Sylvia H. Rambo

Argued March 26, 2007
Before: FISHER, JORDAN and ROTH, *Circuit Judges.*

(Filed: August 2, 2007)

Kurt J. Weist (Argued)
PennFuture
610 North Third Street
Harrisburg, PA 17101
Attorney for Appellants

Tamara N. Rountree (Argued)
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026
Attorney for Appellees, Dirk Kempthorne, et al., and Brent Wahlquist, et al.

Dennis Whitaker (Argued)
Department of Environmental Protection
909 Elmerton Avenue, 3rd Floor
Harrisburg, PA 17110
Attorney for Appellee, Pennsylvania Dept. of Environmental Protection

---

OPINION OF THE COURT

FISHER, *Circuit Judge*.

This is an appeal from a grant of summary judgment by the District Court sustaining two decisions of the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement. Plaintiffs challenge the agency's decisions to terminate a program deficiency notice issued pursuant to 30 C.F.R. § 732.17, and delete a required amendment that was codified at 30 C.F.R. § 938.16(h), both of which directed Pennsylvania to comply with the requirements of

30 C.F.R. § 800.11(e). For the reasons that follow, we conclude that the agency's decisions were inconsistent with its own regulations and regulatory obligations. We will therefore reverse the judgment of the District Court, in part, and set aside both agency actions.

I. BACKGROUND

A.

Plaintiffs in this case are several nonprofit public interest organizations, corporations, and coalitions dedicated to the preservation of Pennsylvania's environment and conservation of its natural resources. For the sake of convenience, they will be referred to collectively as the "Federation." The individual defendants have all been sued in their official capacities as administration officials. In addition, the Commonwealth of Pennsylvania, Department of Environmental Protection ("PADEP"), has been permitted to join as an intervenor-defendant. The Federation alleges that the Office of Surface Mining Reclamation and Enforcement ("OSM") has taken a position and performed actions inconsistent with its regulatory obligations under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1201, et seq. A short review of the origin and purpose of SMCRA is therefore in order.

Congress enacted SMCRA to provide protection against environmental degradation from coal mining and to clean up areas damaged by past coal mining. *See* 30 U.S.C. § 1202(a) ("It is the purpose of this Act to . . . establish a nationwide

program to protect society and the environment from the adverse effects of surface coal mining operations . . . ."). Many of the adverse effects of surface coal mining relate to the large number of abandoned and unreclaimed coal mining sites strewn across the nation. These sites "continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public . . . ." 30 U.S.C. § 1202(h). SMCRA aims to promote the complete reclamation of these abandoned mining sites and seeks to assure that the untreated mine discharges of abandoned sites are abated. *See Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 233 (3d Cir. 1995). The statute empowers the Secretary of the Interior, through OSM, to promulgate regulations to realize these goals and oversee the regulatory program. 30 U.S.C. § 1211(c).

Significantly, however, SMCRA allows a State to steward its own regulatory program if it can administer that program according to federal standards. Under this "cooperative federalism" approach, individual States are expected to take the lead in regulation while the federal government oversees their efforts. Once a State program is approved, the State achieves "primacy" over the regulation of its surface mining program under SMCRA. Pennsylvania attained primacy in 1982. *See* 47 Fed. Reg. 33,050, 33,076 (July 30, 1982).

When a State has primacy, operators of surface coal mining sites are required to file an application for a surface coal mining and reclamation permit with the state regulatory authority. 30 U.S.C. § 1252(a). To receive a mining permit,

operators are required to submit a detailed reclamation plan for the site in question. This plan must provide sufficient information to demonstrate that complete reclamation can be accomplished. 30 U.S.C. §§ 1257(d), 1258(a). In addition, after the permit application has been approved, but before the permit is issued, applicants are required to file a performance bond with the regulatory authority. 30 U.S.C. § 1259(a). SMCRA's bonding program is designed to provide further assurance of "complete reclamation of mine sites." *Cat Run Coal Co. v. Babbitt*, 932 F. Supp. 772, 774-75 (S.D. W. Va. 1996). Under SMCRA, the bonds collected by States from mining operators must be "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority," *i.e.*, the State. 30 U.S.C. § 1259(a).

A conventional bond system ("CBS"), authorized by 30 U.S.C. § 1259(a), is sometimes referred to as a "full cost" system because the cost of the bond is not discounted or supplemented by any other source. Rather, the operator must pay the entire cost of the bond needed to complete reclamation in the event of forfeiture. *Id.* A CBS bond is site specific, covering the permit area upon which the operator conducts surface coal mining. *Id.* ("The bond shall cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations within the initial term of the permit."). As mining and reclamation operations within the permit area are expanded, the permit holder must file additional bonds to cover the additional operations. *Id.* ("As succeeding increments of surface coal mining and reclamation operations are to be initiated and conducted within the permit area, the permittee shall file with

the regulatory authority an additional bond or bonds to cover such increments . . . .").

An alternative bond system ("ABS"), authorized by 30 U.S.C. § 1259(c), is a collective risk-spreading system that draws in part on a bond pool to cover the reclamation liabilities of each individual mining site. An ABS allows a State to discount the amount of the required site-specific bond to an amount that is less than the full cost needed to complete reclamation of the site in the event of forfeiture. Individual mine operators contribute to the bond pool, thereby sharing the liability of reclamation and compensating for the discounted site-specific bonds.

B.

Pennsylvania's past and present efforts to comply with its obligation to maintain a solvent bond system form the backdrop for this appeal. Pennsylvania first instituted an ABS to cover surface coal mines in 1981, even before it obtained primacy over mining activities in the Commonwealth. *See* 11 Pa. Bull. 2680 (August 1, 1981) (final rule implementing ABS). As previously noted, OSM approved Pennsylvania's surface coal mining regulatory program in 1982. 47 Fed. Reg. 33,050 (July 30, 1982); *see generally Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268-72 (1981) (describing state program approval process). Under the approved program, Pennsylvania had the authority to implement either an ABS or CBS.

From 1982 until 2001, Pennsylvania opted for a bifurcated bond system, with surface coal mines, as well as coal refuse reprocessing operations and coal preparation plants, covered by an ABS, and underground coal mines and coal refuse disposal operations covered by a CBS. The ABS that Pennsylvania used for its surface coal mines consisted, in part, of site-specific bonds set below the cost of reclamation. These discounted site-specific bonds were supplemented by a statewide bond pool called the "Surface Mining Conservation and Reclamation Fund" ("PA SMCRA Fund"), 52 Pa. Stat. Ann. § 1396.18. The PA SMCRA Fund receives revenue from several sources, including the collection of a one-time, non-refundable, per-acre reclamation fee paid by individual operators of surface coal mines. That fee was originally $50 per acre, but was raised to $100 per acre in 1993. *See* 25 Pa. Code § 86.17(e).

On January 10, 1991, OSM's director notified PADEP that Pennsylvania's "alternative bonding system must be modified to provide the resources needed to reclaim existing permanent forfeiture sites within a reasonable timeframe and to ensure that future forfeiture sites will be reclaimed in a timely manner. These resources must be sufficient to complete the reclamation plan approved in the permit." On May 31, 1991, in a final rule conditionally approving a proposed state program amendment, OSM codified a "required regulatory program amendment," 30 C.F.R. § 938.16(h), directing Pennsylvania to submit information by November 1, 1991, indicating that the PA SMCRA Fund was solvent. Specifically, the rule required Pennsylvania to either "submit information, sufficient to demonstrate that the [ABS] can be operated in a manner that

will meet the requirements of 30 C.F.R. § 800.11(e)," or to amend its rules or otherwise amend its program by November 1, 1991, to be compliant with Federal standards. 56 Fed. Reg. 24,687, 24,719-21 (May 31, 1991). This "required amendment" was published in the Federal Register on May 31, 1991, as a final rule, following public notice as a proposed rule in the February 26, 1990 Federal Register and a period of public comment. *Id.*

In addition, on October 1, 1991, OSM sent Pennsylvania a letter pursuant to 30 C.F.R. § 732 ("Part 732 Notice"). Part 732 of the Code sets out the procedural requirements for submission, review and approval of state programs, *id.* §§ 732.11-732.16, along with the requirements for submission and approval of state program amendments. *Id.* § 732.17. As described by the District Court, a Part 732 Notice "is a document in which [OSM] notifies the State that its regulatory program must be amended to be in accordance with SMCRA and consistent with the Federal regulations . . . . Such notification may be necessary as a result of Federal regulation changes, State or Federal court decisions, or problems identified during oversight or other program review processes." *Pennsylvania Fed'n of Sportsmen's Clubs v. Norton*, 413 F. Supp. 2d 358, 364 (M.D. Pa. 2006).

The Part 732 Notice in this case indicated that Pennsylvania's regulatory program was no longer in compliance

with SMCRA and related federal regulations.[1] Specifically,

---

[1]The Part 732 Notice states, in part:

> The specific event leading to this determination is an OSM Field Office evaluation of the adequacy of the Commonwealth's alternative bonding system (ABS). This evaluation identified unfunded reclamation liabilities (for backfilling, grading, and revegetation) in excess of eight million dollars for current bond forfeiture sites alone. The review also found that the ABS is financially incapable of abating or permanently treating pollutional discharges from bond forfeitures. Even if no such discharges are created in the future, annual treatment costs for existing discharges are currently estimated at 1.3 million dollars.
>
> Section 509(c) of SMCRA authorizes the Secretary to approve an ABS if it will achieve the objectives and purposes of the otherwise mandatory conventional bonding program. As set forth in 30 CFR 800.11(e), this provision means that the ABS must (1) assure that sufficient funds are available to complete the reclamation plans for any areas in default at any time, and (2) provide a substantial economic incentive for the operator to comply with all reclamation requirements. As discussed in the preceding paragraph, these conditions no longer exist in Pennsylvania.

OSM explained that a field office evaluation had determined that Pennsylvania's ABS system was "financially incapable of abating or permanently treating pollutional discharges from bond forfeiture sites . . . ," and that the default reclamation requirements of 30 C.F.R § 800.11(e) were no longer satisfied. OSM acknowledged that Pennsylvania had already initiated the legislative process to increase the per-acre reclamation fee for the PA SMCRA fund (which would eventually lead to the $50 to $100 increase in 1993), but concluded that a more comprehensive analysis had to be conducted to determine if the revised ABS could reasonably be expected to generate sufficient funds. OSM required that Pennsylvania submit within sixty days "either proposed amendments or a description of amendments to be proposed to remedy the deficiency." In response to this demand, PADEP sent a letter on December 6, 1991, which briefly outlined its plan to address the bonding concerns. The letter described PADEP's efforts to initiate an actuarial review of its ABS and proposed a site-specific and umbrella "trust fund" approach to meeting its obligations under SMCRA. On March 3, 1992, OSM responded that PADEP's plan was still insufficient to satisfy the requirements of the Part 732 Notice.

On July 6, 1993, OSM approved Pennsylvania's per-acre reclamation fee increase from $50 to $100. 58 Fed. Reg. 36,139, 36,141. However, it emphasized the mutual understanding between OSM and Pennsylvania that this fee increase was a "stop-gap" measure, "an intermediate step to keep the shortage in the [PA SMCRA] Fund from further deteriorating," *id.* at 36,140, rather than a long term solution to the insolvency problem of the PA SMCRA Fund. The

Pennsylvania Environmental Quality Board agreed that "[t]o allow the [PA SMCRA] Fund to remain insolvent is not an acceptable bond program under Pennsylvania SMCRA or the Federal SMCRA."

Nearly two years later, on May 31, 1995, OSM sent the Secretary of PADEP a letter the Federation describes as a dunning letter reminding the Secretary of PADEP's outstanding obligations under OSM's Part 732 Notice to amend its program to address the PA SMCRA insolvency problem. The letter acknowledged an earlier October 1993 PADEP proposal to enhance its bonding system through a master trust fund, but observed that no action had been taken to implement this proposal. It directed PADEP to take immediate action to finalize these or other proposals.

A letter dated September 28, 1998, from PADEP to the Pennsylvania Coal Association's Director of Regulatory Affairs, underscored the magnitude of Pennsylvania's bonding program deficiencies:

> [PA]DEP is currently holding about $89 million in reclamation bonds, involving 178 coal operators and 102 financial institutions on 331 permits that have long been reclaimed, but have one or more discharges. Pennsylvania law prohibits the release of these bonds unless other financial assurances for the long-term treatment of water are provided. In addition, the bonds do not represent anywhere near the amount of money

> required to provide for the long-term treatment of discharges in case of default by an operator.

This letter set forth various proposals for ameliorating the problem and concluded that "[t]he risk, and I believe certain consequence, of not dealing with this problem now and in earnest is the real possibility that some court will eventually decide the issues for us. The dog is no longer sleeping."

Less than a year later, on June 3, 1999, the Citizens for Pennsylvania's Future ("PennFuture"), on behalf of various parties, filed the advance notice required for a citizen's suit. This notice alleged, inter alia, that Pennsylvania's bonding system had been insolvent for over a decade, and that "[t]he amount of bond money posted for those sites [] is grossly insufficient for providing long term treatment." In the midst of settlement negotiations between PennFuture and PADEP, PADEP issued an October 6, 1999 news release announcing its decision to adopt a full-cost CBS that would "fully reflect the department's estimated cost for reclamation . . . ."[2]

OSM's initial position on this proposed solution to the insolvency of the PA SMCRA Fund was expressed at a

---

[2]On October 13, 1999, the Federation filed a related action in the Middle District of Pennsylvania seeking to compel Federal and State officials to comply with various provisions of SMCRA. *Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Kathleen A. McGinty*, No. 99-CV-1791. That action is stayed pending disposition of this matter.

November 18, 1999, meeting with PADEP representatives. The OSM concluded that "conversion to FCB [full cost bonding] for all current and future permits, as outlined by PADEP, would not resolve the outstanding [1991] Part 732 Notification" because it failed to address "current liability that has accrued against the ABS" and that PADEP could not dissolve the ABS without first addressing those existing liabilities. OSM explained that "the liability of a bond pool for the reclamation costs on a given forfeited site is not limited to any assigned amount. Rather its obligation, as stated in 30 C.F.R. § 800.11(e)(1), is to 'have sufficient money available to complete the reclamation plan for any areas which may be in default at any time.'" Consequently, OSM concluded that "PADEP's proposal cannot be approved in its entirety."

OSM clarified this position in a document sent to PADEP in a June 2000 memorandum in response to PADEP's request for guidance, explaining that "[f]ederal regulations do not authorize partial or full 'write off' of liability through ABS modification, and Pennsylvania must administer the program so that all liabilities accrued against the ABS are accounted for . . . ." Three months later, in a letter to the Secretary of PADEP dated October 11, 2000, OSM's Regional Director restated the position that "[a]ddressing forfeiture sites remains a critical aspect of OSM's 1991 notice on ABS insolvency and requires corrective action." The Regional Director explained that OSM had consistently interpreted the provisions of 30 C.F.R. § 800.11(e)(1) as "requiring that (1) a state is responsible to administer its ABS in a manner that provides sufficient funds, including funds for treatment of AMD [acid mine drainage] emanating from forfeiture primacy permits; and (2) an ABS can

only be terminated when all sites bonded under the system are successfully reclaimed or adequate replacement bonds are provided."

C.

On August 4, 2001 PADEP formally announced the termination of its ABS and conversion to a CBS for surface mines, coal refuse reprocessing and coal preparation plants. In an attempt to resolve concerns regarding OSM's May 1991 Codified Required Amendment and Part 732 Notice, PADEP and OSM exchanged drafts of what would become the jointly authored "Pennsylvania Bonding Systems Program Enhancements" ("Program Enhancements Document"). The Program Enhancements Document was officially submitted to OSM on June 5, 2003, and provides descriptions of various aspects of Pennsylvania's bonding program, including summaries of actions taken and plans for future actions.

The Program Enhancements Document outlines Pennsylvania's August 2001 termination of the ABS and conversion to a CBS as well as revisions made and proposed to the CBS system subsequent to the conversion. Specifically, it explains that, after the conversion, Pennsylvania's existing and future mine operators could no longer rely on the Commonwealth's existing ABS to meet performance bond requirements. Existing operators originally permitted and bonded under the ABS fund were required to obtain new CBS bonds. New operators were also required to be permitted and bonded under a CBS bond and, consequently, were required to pay the full cost of bond coverage.

In addition, the Program Enhancements Document discusses revisions and proposed revisions to the CBS, including measures directed to OSM's original concerns regarding Pennsylvania's compliance with 30 C.F.R. § 800.11(e). For land reclamation on bond forfeiture sites, the Program Enhancements Document indicates that PADEP requested and the Pennsylvania General Assembly appropriated $5.5 million to address the deficit in the PA SMCRA Fund. Additionally, in the course of the ABS to CBS conversion, the Program Enhancements Document indicates that PADEP would continue to collect the $100 per-acre reclamation fee from mine operators filing for new permits for the PA SMCRA Fund "to cover forfeitures that occurred during the conversion."

Finally, the Program Enhancements Document includes a "Workplan" that prioritizes and allocates resources, purporting to "adequately provide for abatement or treatment of pollutional discharges on primary forfeiture sites." The document asserts that this Workplan "addresses more discharges than is required by federal SMCRA." Attached as an appendix to the Program Enhancements Document, the Workplan's full title is the "Alternate Bonding System Primacy Discharge Abatement Workplan." It explains that PADEP and OSM had completed an initial inventory of discharges on sites forfeited under the State's ABS. Briefly summarized, the Workplan describes PADEP's intent to clean up those discharges through a

"watershed approach" that utilizes various financial and programmatic resources.[3]

OSM's regional director sent a letter to PADEP on June 12, 2003, one week after submission of the Program Enhancements Document, stating that PADEP's "transition of existing active and inactive permits covered by the ABS conventional bonds . . . is now complete." The letter concurred with PADEP's conclusions that the measures taken by PADEP, as described in the Program Enhancements Document, were sufficient to remedy the deficiencies set forth in OSM's October 1, 1991 Part 732 Notice. OSM noted that Pennsylvania's CBS had been "revised and improved" and concluded that the actions taken by PADEP warranted termination of the Part 732 Notice.

In addition, two weeks later on June 26, 2003, OSM issued a proposed rule to remove the required amendment at 30 C.F.R. § 938.16(h). 68 Fed. Reg. 37,987. In that proposed rule, OSM asserted that the strategy outlined in the Program

---

[3]Those resources are: (1) Remining; (2) Reclamation-in-lieu of civil penalty agreements with active operators; (3) Surety reclamation/abatement of forfeited sites; (4) Bonds forfeited and collected from the site; (5) Excess funds from the ABS; (6) Title IV AML funding for insolvent surety companies; (7) Title IV 10% set-aside funding for insolvent sites in Qualified Hydrologic Units; (8) Additional Pennsylvania funding, such as Growing Greener; (9) Other funds or approaches that become available.

Enhancements Document would "satisfy [OSM's] concerns as to whether the [PA SMCRA] Fund can be operated in a manner that will meet the requirements of 30 C.F.R. § 800.11(e)." *Id.* at 37,988. OSM also stated "[s]ince we are now satisfied that [Pennsylvania's] bonding program enhancements adequately address[ed] our concerns about the ability of the bonding program to ensure the completion of the reclamation plan . . ., we are proposing the removal of the first portion of 30 C.F.R. 938.16(h)." *Id.* OSM invited public comments on whether it should consider the information submitted by Pennsylvania sufficient to remove the required amendment. *Id.* However, it stated that "[b]ecause we decided on June 12, 2003, that PADEP's bonding program enhancements satisfy the concerns expressed in our October 1, 1991, Part 732 Notification Letter, we are not seeking comments on the adequacy of those bonding program enhancements." *Id.* at 37,988-37,989.

The Federation submitted extensive comments on the proposed rule, as well as on OSM's decision to terminate the Part 732 Notice, in a 40-page memorandum to OSM's Regional Director on July 25, 2003. It asked the Regional Director to "reconsider and rescind [the termination of the 732 Notice], and . . . similarly reconsider and decline to adopt the proposed rule . . . ." The Federation characterized OSM's actions as a "Retreat from Responsibility," and a "flip-flop," and argued that Pennsylvania's new program failed to cover the costs of mine drainage treatment, and thus the full cost of reclamation, at many sites with post-mining discharges. The Federation complained that Pennsylvania was "writing off" ABS reclamation liabilities by leaving discharges from ABS forfeiture sites untreated and by transferring those liabilities to

other programs and sources of funding identified in the Workplan. In addition, the Federation observed that the Workplan lacked any meaningful and enforceable commitments to funding levels or implementation deadlines. To this end, the Federation argued that "[a] 'Workplan' is no substitute for [the] guarantee" of treatment required by SMCRA. Consequently, the Federation argued that the required amendment at 30 C.F.R. § 938.16(h) should not be removed.

On October 3, 2003, OSM declined the Federation's request that it rescind its June 12, 2003 letter terminating the Part 732 Notice, and stated that the Federation's request that OSM retain 30 C.F.R. § 938.16(h) "will be separately addressed in a FR [final rule] notice to be published in the near future." On October 7, 2003, OSM published a final rule in the Federal Register, announcing its removal of the required amendment at 30 C.F.R. § 938.16(h). 68 Fed. Reg. 57805. The final rule responded to the Federation's objections by explaining that "Pennsylvania's conversion from the ABS to full cost bonding, renders moot that portion of the required amendment concerned with the solvency of the Fund." *Id.* at 57806.

On December 8, 2003, the Federation commenced the underlying action in the District Court by filing a three-count complaint. The parties presented their cases, as is customary in agency review proceedings, in cross motions for summary judgment. The District Court denied the Federation's motion and granted OSM's cross motion to dismiss the complaint on all

three counts in a Memorandum and Order issued February 1, 2006.[4] This timely appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had subject matter jurisdiction over this matter under 28 U.S.C. § 1331 and 30 U.S.C. § 1276(a)(1). We have jurisdiction over the appeal from a final judgment of the District Court under 28 U.S.C. § 1291. Our review of the District Court's grant of summary judgment is plenary, applying the same standard the District Court was required to apply. *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 201 (3d Cir. 2005). A grant of summary judgment is proper where, viewing the facts in the light most favorable to the non-moving party, the moving party has established that "there is no genuine dispute of material fact" and it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Judicial review of agency actions under SMCRA is conducted according to the deferential standard applied to administrative actions. SMCRA provides that "any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." 30 U.S.C. § 1276(a)(1). This standard is consistent with the

---

[4]Dismissal of the first count, alleging that OSM had failed to follow administrative procedures required by law in rescinding the final rule and required amendment, is not appealed by the Federation.

Administrative Procedure Act's requirement that an agency's action be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006) (comparing SMCRA standard to APA standard). The scope of review under this standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

However, courts are "not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *see also Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 151 (3d Cir. 2004) (a reviewing court must ensure that an agency's ruling is not "inconsistent with applicable regulations"). The arbitrary and capricious standard of review applies equally to an agency's decision to pass a rule or rescind a rule. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42-43. Moreover, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42.

In determining whether an agency's actions were arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law we look to the statute delegating authority to the agency to make and enforce rules pursuant to the statute. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In this case, the statute is SMCRA, which

delegated rulemaking power to the Department of Interior (and consequently OSM, which is within the Interior Department). 30 U.S.C. § 1251(b) (authorizing permanent program regulations). Under the familiar two-step *Chevron* analysis, a court first looks to the statute to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the statute is silent or ambiguous, we move to step two of the inquiry. At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The Supreme Court has described the standard of review at step two as "arbitrary and capricious" review. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *see also National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) ("[W]e defer at step two to the agency's interpretation so long as the construction is a reasonable policy choice for the agency to make." (internal quotes omitted)). We therefore approach agency regulations with great deference when reviewing them under *Chevron*'s second step.

III. DISCUSSION

A.

The OSM actions under review in this appeal are the agency's termination of the Part 732 Notice and removal of the codified required amendment at 30 C.F.R. § 938.16(h). Our review of these actions requires us to consider the applicability of 30 C.F.R. § 800.11(e) because OSM argues, and the District Court agreed, that Pennsylvania's conversion from an ABS to a CBS rendered § 800.11(e) inapplicable and mooted the issue of

compliance with the provision. *Pennsylvania Fed'n of Sportsmen's Clubs*, 413 F. Supp. 2d at 377 ("[A] conversion to the CBS amounts to a conversion of applicable statutory provisions and regulations [and as a result] any ongoing obligations from 30 C.F.R. 800.11(e) cease to apply."). As a threshold matter, however, we must determine whether Pennsylvania's ABS system was actually terminated by Pennsylvania's August 4, 2001 announcement, and, if so, whether OSM's actions in approving this purported termination of the ABS and conversion to a new bonding system were inconsistent with the applicable regulations and therefore an abuse of discretion.

The Federation argues that because Pennsylvania's ABS is part of the approved Pennsylvania regulatory program, it may be dissolved only through PADEP's submission and OSM's approval of a State program amendment deleting the authorization for an ABS from the program.[5] *See* 30 C.F.R. § 732.17(g) ("Whenever changes to laws or regulations that make up the approved State program are proposed by the State, the State shall immediately submit the proposed changes to the

---

[5]OSM argues that the Federation has waived the argument that "Pennsylvania's ABS could be terminated only through a program amendment," Br. of Appellee OSM 39 n.9, by failing to raise it below. However, we believe this argument is preserved as a component of a larger issue argued by the Federation in the District Court, namely that "the ABS continues to exist as an approved part of the Pennsylvania program." Plaintiffs' Surreply Br., Doc. 55 at 6 n.6.

Director as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment."). However, Pennsylvania's program, as originally approved in 1982, provides for the option to implement either a CBS or an ABS. PA SMCRA states in relevant part that:

> The amount of the bond required shall be in an amount determined by the department based upon the total estimated cost to the Commonwealth of completing the approved reclamation plan, or in such other amount and form as may be established by the department pursuant to regulations for an alternate coal bonding program which shall achieve the objectives and purposes of the bonding program.

52 Pa. Cons. Stat. Ann. § 1396.4. OSM approved this bonding portion of PA SMCRA without condition. *See* 47 Fed. Reg. 33,079-80 (setting forth "§ 938.11 Conditions of state regulatory program approval."). As such, it is unnecessary for PADEP to codify a new regulation or amend its existing regulation. Under the current regulations, both state (52 Pa. Cons. Stat. Ann. § 1396.4) and federal (47 Fed. Reg. at 33,079-80), Pennsylvania is already authorized to pursue any bonding scheme it desires so long as that scheme achieves the ultimate objective of the bonding program, which is to guarantee sufficient funds for reclamation. The conversion from an ABS to a CBS is therefore not a "change[] to laws or regulations that make up the approved State program," 30 C.F.R. § 732.17(g), that triggers the SMCRA program amendment process. It is merely an exercise of

authority already granted to Pennsylvania in the existing regulations. OSM's actions in approving this conversion were therefore not arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law.

The Federation alights on the fact that Pennsylvania continues to collect the OSM-approved reclamation fee, which continues to supply the PA SMCRA Fund (or "ABS fund," App. 265). This fund, the Federation observes, may only be used to reclaim mining sites that had obtained bond coverage under the former ABS by paying the ABS reclamation fee. 25 Pa. Code §§ 86.17(e), 86.187(a)(1). This continued use of an ABS fund fed by an ABS reclamation fee, the Federation argues, confirms the continued existence of an ABS.[6] However, while it is true that the "ABS Fund" continues to exist in name, it no longer operates as an ABS, that is, as a bond pool to provide liability coverage for new and existing mining sites. Under the new terms of PADEP's Program Enhancements Document, existing and future operators can no longer rely on the PA SMCRA Fund for their bond coverage. Existing operators that were originally bonded under the ABS, and relied on the supplemental revenue in the Fund, were required to obtain new, CBS bonds. New

---

[6]OSM proposed a rule including a proposed amendment to 25 Pa. Code § 86.17(e) that would "discontinue the collection of [Pennsylvania's] Alternative Bonding System (ABS) $100 per acre reclamation fee." 71 Fed. Reg. 50868, 50869 (col. 1) (August 28, 2006). However, in its final rule, OSM has deferred its decision on the proposed change until final disposition of this appeal. 72 Fed. Reg. 19117, 19120 (col. 1) (February 23, 2007).

operators were and are required to be permitted and bonded under a CBS bond and, consequently, were and are required to pay for the full cost of their bond coverage. Thus, while there still is a legacy alternative bond fund that is being paid into and drawn on "to cover for forfeitures that occurred during the conversion," there is no longer a current or prospective ABS in Pennsylvania.

B.

Although we have determined that Pennsylvania has effectively converted to a CBS and OSM did not abuse its discretion in approving that conversion, neither we nor OSM are yet out of the woods, so to speak. That is because we are still faced with the question of what obligations, if any, Pennsylvania has to ensure reclamation of sites forfeited before the conversion to a CBS began, plus any additional sites whose reclamation costs are still not fully covered by CBS bonds. To clarify, it is important we distinguish between the ABS as a bonding program, which no longer exists in Pennsylvania, and the particular mine sites bonded under that now defunct program. This distinction is a critical one as the conclusion that it is permissible under SMCRA for a State to dissolve its ABS program, in the manner Pennsylvania has, does not lead ineluctably to the conclusion that all liabilities accrued under that program are also automatically dissolved. In other words, there are still mining sites in Pennsylvania that were originally bonded under the ABS and forfeited prior to the CBS conversion. The question remains as to what obligations Pennsylvania has to provide for complete reclamation and treatment of these mining sites and their pollutional discharges.

OSM argues, and the District Court agreed, that whatever obligations Pennsylvania has, those obligations are not the ones set forth in 30 C.F.R. § 800.11(e). That provision, OSM maintains, simply ceased to apply once the prospective conversion to a CBS was announced and approved. OSM's position, simply stated, is that, because there is no longer an ABS in Pennsylvania, § 800.11(e) is no longer applicable and any obligations set forth in that provision are no longer binding. To reiterate, the District Court "agree[d] that a conversion to the CBS amounts to a conversion of applicable statutory provisions and regulations." *Pennsylvania Fed'n of Sportsmen's Clubs*, 413 F. Supp. 2d at 377. We do not agree with this conclusion entirely. We agree that the conversion to a CBS amounts to a change in statutory provisions going forward for those mining sites where complete reclamation costs are now fully covered by CBS bonds. However, we do not agree that sites forfeited before the conversion began are no longer subject to regulation under § 800.11(e).

To start, like the Federation, we find OSM's apparent "about face" on the issue of the applicability of 30 C.F.R. § 800.11(e)(1), and more generally Pennsylvania's outstanding and future reclamation liabilities, striking.[7] However, an agency

---

[7]OSM examined § 800.11(e)(1) in a 1991 final rule concerning the ABS of Missouri. 56 Fed. Reg. 21281 (May 8, 1991). In an effort to address an "unexpectedly large default" leaving substantial acreage unreclaimed at mines forfeited before September 1988, *id.* at 21283 (col. 1), 21286 (col. 2), Missouri submitted a program amendment to OSM that would

have modified the state's ABS "to provide money to cover only part of the cost of reclaiming sites that were in bond forfeiture prior to September 1, 1998." *Id.* at 21283 (col. 1). Rejecting that proposal, the agency explained:

> Reclamation liability under a bond pool must be continuous. The liability and obligation of an ABS does not disappear if the bond pool finds itself unable to meet its obligations as they mature, or its existing capital structure is impaired or its ability to perform any of its obligations is impaired. Additionally, existing liabilities of an impaired pool cannot be erased simply because proposed modifications to the pool will assure partial satisfaction of existing reclamation liabilities. Stated differently, if a bond pool comes up short of cash, the regulatory authority cannot and should not be able to simply "write off" any existing reclamation liabilities and then resume business as usual by proposed modifications to the previous ABS. This would be directly in conflict with the language of 30 CFR 800.11(e) and the purposes and objectives of section 509 of SMCRA, which provide that an ABS, must have available sufficient money to complete reclamation for any areas which may be in default at any time.

56 Fed. Reg. at 21286 (col. 2-3).

In the same rule, OSM rejected a proposal by Missouri to supplement its ABS with a CBS. Missouri proposed to allow new operations to "opt-out" of the ABS by posting a full cost conventional bond, 56 Fed. Reg. at 21287 (col. 1-2, Finding B.5(a)), and existing permittees to "buy out" of the ABS by posting such a bond and paying a one-time assessment into the State's ABS bond pool fund. *Id.* at 21287 (col. 2-3, Finding B.5(c)). OSM explained that the Missouri ABS fund had "continuing liability to reclaim sites forfeited in the past," *id.* at 21287 (col. 3), and rejected these CBS proposals because Missouri had provided "no assurances that past bond forfeiture liabilities [of the ABS] will be met." *Id.* at 21287 (col. 1-3). OSM reasoned that Missouri was relying on the ABS at the time of the bond forfeitures, which, coupled with the language of 30 C.F.R. § 800.11(e)(1), gave the Missouri ABS a "continuing liability to reclaim sites forfeited in the past." 56 Fed. Reg. at 21287 (col. 3).

Similarly, in a final rule involving West Virginia's ABS, OSM required the State "to eliminate the deficit in the State's alternative bonding system and to ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites." 60 Fed. Reg. 51900, 51918 (col. 2) (October 4, 1995).

As described *supra*, Part I.B, in various communications with PADEP, OSM previously took a similar position with respect to Pennsylvania's ABS. OSM emphasized that "Federal regulations do not authorize partial or full 'write off' of liability through ABS modification, and Pennsylvania must administer

is not estopped from "changing a view [it] believes to have been grounded upon a mistaken legal interpretation [and] . . . an administrative agency is not disqualified from changing its mind . . . ." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (citations omitted). Indeed, *Chevron* itself involved an agency reversal on a significant question of statutory construction. *See Chevron*, 467 U.S. at 857-58. On the other hand, "[a]s a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."). When an agency "sharply change[s] its substantive policy, then, judicial review of its action, while deferential, will involve a scrutiny of the reasons given by the agency for the change." *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982).

---

the program so that all liabilities accrued against the ABS are accounted for . . . ." OSM "insist[ed] that PADEP must deal with the current liability that has accrued against the ABS [through past bond forfeitures] as well as any future liability from the forfeiture or existing permits under the ABS that are unwilling or unable to convert to FCB." OSM made clear its conviction that this position was "mandated by the Federal regulations at 30 C.F.R. § 800.11(e)(1) . . . ," and "consistent with decisions it ha[d] issued with respect to ABS program amendments from Missouri and West Virginia."

Under these circumstances, OSM bears the burden of rationally explaining its departure from its previous position. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-44 (1983).

With respect to the step one of the *Chevron* inquiry – whether Congress has spoken directly to the question at hand – we agree with the District Court that "[t]he language of SMCRA itself does not address dissolution of an ABS one way or the other." *Pennsylvania Fed'n of Sportsmen's Clubs*, 413 F. Supp. 2d at 377. To state the issue more precisely, Congress has not set forth any requirements under SMCRA or any of its regulations dictating how a conversion from an ABS to a CBS is to be executed and how any remaining liabilities from an insolvent ABS are to be discharged. As SMCRA and its regulations are silent on the issue of dissolution of an ABS, we proceed to step two of the *Chevron* analysis where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc.*, 467 U.S. at 483. The basic tenets of statutory construction apply to construction of regulations and "[our] starting point on any question concerning the application of a regulation is its particular written text." *Wilson v. United States Parole Comm'n*, 193 F.3d 195, 197 (3d Cir. 1999). The regulation at issue provides:

> OSM may approve, as part of a State or Federal program, an alternative bonding system, if it will achieve the following objectives and purposes of the bonding program:

> (1) The alternative must assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time.

30 C.F.R. § 800.11(e)(1).

OSM fixes on the words "may approve" and argues that the terms of the provision therefore refer only to the conditions for approval of ABS programs.[8] However, this suggested narrow construction is contradicted by the more expansive language in § 800.11(e)(1), which requires that "the regulatory authority [] have available sufficient money to complete the reclamation plan for any areas which may be in default at any time . . . ." "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). OSM's argument that the "'at any time component' . . . applies to the ABS that is the subject of the proposal and approval," Br. of Appellees at 40, is unavailing given that the words "at any

---

[8]In addition, PADEP points out that the section heading of § 800.11 is entitled "Requirement to *file* a bond" (emphasis added), and argues that the provision only sets forth those initial requirements for filing. However, it is a "well-settled rule of statutory interpretation that titles and section headings cannot limit the plain meaning of statutory text where that text is clear." *M.A. ex rel. E.S. v. State-Operated Sch. Dist.*, 344 F.3d 335, 348 (3d Cir. 2003).

time" are immediately preceded by the words "any areas which may be in default." The context makes clear that the words "at any time" apply not to the ABS program in general, but to specific "areas", *i.e.*, mining sites bonded under the ABS. *See Textron Lycoming Reciprocating Engine Div. v. Automobile Workers*, 523 U.S. 653, 657 (1998) ("[I]t is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." (citation and quotations marks omitted)). Thus, a plain reading of the words "any areas which may be in default at any time" indicate that the obligations prescribed by § 800.11(e) are not restricted to the immediate circumstances surrounding the approval of an ABS, but are instead ongoing in nature and apply at any time, so long as those mining areas originally bonded under the ABS, and not yet converted to CBS bonds, still exist.

Furthermore, keeping in mind the distinction between sites bonded under the ABS and the ABS itself, we see no reasonable basis for OSM's assertion that a purely prospective process – the transition to a CBS initiated on August 4, 2001 – should have retroactive effects on obligations that already accrued and guarantees that were already made under the ABS while the ABS was still active. This assertion is inconsistent with the expansive language of § 800.11(e) insofar as it adds to the phrase "any areas which may be in default at any time" an implicit limitation – "until a new bonding system is in place for new or ongoing mine operations." Furthermore, it would allow the regulatory authority to disclaim or "write off" existing

reclamation liabilities,[9] a result which would be contrary to the fundamental purpose of SMCRA's bonding requirement, which is to ensure complete reclamation of mining sites in the case of forfeiture. *See Cat Run Coal Co.*, 932 F. Supp. at 774; 30 U.S.C. § 1259(a). Consequently, even under the deferential standard applicable to agency interpretations, OSM's construction of 30 C.F.R. § 800.11(e) is impermissible. *Mercy Catholic Med. Ctr.*, 380 F.3d at 151. We conclude that § 800.11(e) continues to apply to sites forfeited prior to the CBS conversion and that § 800.11(e) requires that Pennsylvania fulfill the obligations it voluntarily assumed to ensure that these sites are fully reclaimed.

C.

Finally, we turn to Pennsylvania's Program Enhancements Document. This document provided the justification for Pennsylvania's claim that the deficiencies identified in OSM's 732 Notice and 30 C.F.R. § 938.16(h) amendment had been remedied. OSM is careful to emphasize that, for purposes of its review, it did not view the Program

---

[9]At oral argument, counsel for the Federation analogized OSM's argument to that of a credit cardholder who cancels the card and then claims that his or her outstanding balance should be limited to the cash he has on hand. While we recognize that the analogy is imperfect, as Pennsylvania is not in the position of a debtor, we believe it illustrates the principle that accrued liabilities under a particular financial regimen do not simply disappear when an individual or entity abandons that regimen.

Enhancements Document as a means of complying with § 800.11(e) because it believed that Pennsylvania's bond conversion mooted the issue of compliance with that provision. As the District Court correctly observed, however, "the decision to terminate the Part 732 Notice was made after consideration of the actions taken over the years – actions that were described in the program enhancements document." *Pennsylvania Fed'n of Sportsmen's Clubs*, 413 F. Supp. 2d at 377. In light of our conclusion that § 800.11(e) continues to apply to sites forfeited prior to the conversion, the Program Enhancements Document takes on special significance. If, in fact, the Program Enhancements Document does not ensure compliance with § 800.11(e), then it is an inadequate response to OSM's 732 Notice and 30 C.F.R. § 938.16(h) amendment, both of which emphatically called for Pennsylvania to take measures to comply with its obligations pursuant to § 800.11(e).

As described *supra*, the Program Enhancements Document presents an elaborate array of proposals for discharge abatement. The Federation argues that many of these proposals are inadequate, but we need not reach that argument because we believe the Program Enhancements Document is inadequate for a more basic reason: none of the proposals described in it represent enforceable commitments. OSM and PADEP describe these proposals in the language of a guarantee, *see, e.g.*, Br. of Appellee PADEP at 31 (describing the Workplan as a "commitment, acknowledged by OSM [that] became a programmatic obligation"), but Pennsylvania is only obligated under the regulations to enforce the provisions of its approved State program. 30 C.F.R. § 733.11. In turn, OSM may only take oversight action against Pennsylvania for failure to

implement those OSM-approved provisions. 30 C.F.R. § 733.12. Because the Program Enhancements Document is not part of an approved program amendment, it is not part of the Commonwealth's approved State program, and Pennsylvania is therefore under no obligation to implement its "programmatic commitments." While we would not go as far as the Federation in describing the use of language such as "programmatic commitments" and "programmatic accountability" as bureaucratic obfuscation, we do agree that such references do not obscure the simple fact that the Program Enhancements Document sets forth policy aspirations, not enforceable obligations.

Even if we were to concede that PADEP is unlikely to disregard the goals described in the Program Enhancements Document, given the time and effort put into drafting it, SMCRA demands that "sufficient money" will be available "at any time" a discharge from an ABS bond forfeiture site must be treated. 30 C.F.R. § 800.11(e)(1). The plain language of this provision requires that Pennsylvania demonstrate adequate funding for mine discharge abatement and treatment at all ABS forfeiture sites. While the Program Enhancements Document appears to be a good faith effort by OSM and PADEP to allocate scarce resources, SMCRA requires that reclamation and treatment of all post-SMCRA mining areas be guaranteed. 30 U.S.C. § 1259; 30 C.F.R. § 800.11(e)(1). The Program Enhancements Document is a policy directive, not an

enforceable guarantee.[10] Accordingly, OSM's actions in rescinding the October 1, 1991 Part 732 Notice and deleting the 30 C.F.R. § 938.16(h) amendment were inconsistent with SMCRA and OSM's own regulation, 30 C.F.R. § 800.11(e)(1), and therefore an abuse of discretion.

IV. CONCLUSION

Close to thirty years ago, through SMCRA, Congress dealt with the reclamation problem that then faced this country as a result of decades of coal mining that provided needed supplies of energy, but left many States and communities with land that was badly scarred, no responsible party to reclaim the land, and no taxpayer funds that would allow the federal or state government to do the work. Pennsylvania was one of those States with such a problem. At the same time, Pennsylvania had an abundance of coal, communities whose economies benefitted from coal mining, and a coal mining industry interested in doing the work. To provide for reclamation and at the same time allow States such as Pennsylvania to continue mining, SMCRA

---

[10]The parties confirmed at oral argument that the administrative process has been initiated to codify the substantive proposals of the Program Enhancements document as a formal amendment to Pennsylvania's approved regulatory program. We do not reach the question of whether a formal amendment incorporating the substantive proposals of the Program Enhancements Document would adequately address the concerns raised in OSM's 732 Notice and required program amendment.

established new stringent rules for permitting, bonding, mining and reclamation. Notably, it was also one of the first laws passed by Congress employing a new form of federalism, whereby States could assume primary responsibility for implementing the law with a limited amount of federal supervision. Pennsylvania's approved program provided an ABS as an alternative to full cost bonding, which allowed the cost and burden of bonding to be shared across the Commonwealth and the industry. Over the period in which the ABS was in place, significant mining operations took place by responsible operators who met their commitments fully, and produced needed coal while employing thousands of Pennsylvanians in well paying jobs.

However, as well intentioned as the ABS program may have been, within the first ten years of its operation, it became clear that the ABS left the Commonwealth with now unreclaimed land, unabated mine discharges, and a reclamation fund insufficient to meet the new obligations. In 2001, PADEP scrapped the ABS for existing and future mining operations, and converted to the full cost CBS. Since SMCRA was enacted thirty years ago, we are faced in this case, for the first time, with the question of what continued level of supervision OSM should maintain over a State's program where an ABS is converted to a CBS without firm financial guarantees of complete reclamation in place. Although Congress did not speak explicitly to its intention on this precise issue, its message to America in the form of SMCRA is clear enough – the environmental damage resulting from unreclaimed mining sites must be mitigated. To this end, we believe the only reasonable

conclusion in this case is that OSM supervision is required until full guarantees of reclamation are in place.

For the reasons set forth above, we will reverse the District Court's judgment with respect to Counts Two and Three of the Complaint, sustaining the agency actions in this case, and remand to the District Court with instructions to set aside OSM's June 12, 2003 termination of its October 1, 1991 Part 732 Notice, and the portion of OSM's October 7, 2003 final rule deleting the 30 C.F.R. § 938.16(h) amendment, both of which required that Pennsylvania bring its program into compliance with 30 C.F.R. § 800.11(e).

Exhibit D

Mountain
Watershed Association
P.O. Box 408
Melcroft, PA 15462

May 11, 2007

Mr. Michael Terretti
District Mining Operations
Pennsylvania Department of Environmental Protection
RR #2, Box 603-C
Greensburg, PA 15601-8739

Dear Mr. Terretti:

By this point in time you are probably aware that the Mountain Watershed Association and its members and residents in the vicinity of the Geary II strip mine permit application have requested that the Department require Amerikohl to republish the public notice for this proposal. It came to our attention that Amerikohl published its notice in the Tribune-Review on a weekday.

After some inquiry to the Circulation Department of the Trib., we were informed that the Tribune Review only has about 124 customers in the Indian Creek area, while the Daily Courier has 490.

Daily Courier:	Normalville	333
	Mill Run	157
Tribune-Review	Normalville	99
	Mill Run	25

The Fayette County Zoning and Hearing Board continued the zoning hearing on this matter till June 27th. Republication will not place an undue burden on the company, but it does place an undue burden on the community NOT TO HAVE PROPER PUBLIC NOTICE. In point of fact, the Springfield Township Supervisors did not even know about the DEP meeting until the day before. One of our members went door to door to try to notify people, and he was told that even people living close to the proposal had no knowledge of the meeting.

Public notice is supposed to be in a paper of general circulation in the area. The Tribune Review is not the appropriate vehicle for this notice. The Daily Courier is.

In addition, on behalf of the members and the Board of Directors of the Mountain Watershed Association, Inc., I am **again** requesting that a public meeting be held at a time when working people can attend. Your own staff will tell you that evening meetings are more effective. Further, the meeting should be held within the township where the strip mine is proposed.

I find it compelling that the AML public meetings are being held at 6:30 in the evening. Why is there funding for this but not for public meetings in response to active mining proposals?

As I stated before if you need our help to schedule an evening meeting within the township, we will be more than happy to assist you. Please let me know. If you need any clarification of this request, please call me at 724 455-4200. Thank you for your time and consideration in this matter.

Sincerely,

Beverly Braverman

Gardner, Michael

From: Terretti, Michael
Sent: Tuesday, May 22, 2007 3:06 PM
To: 'Mountain Watershed Association'
Cc: McGinty, Kathleen; Heilman, Michael; Stares, Diana
Subject: RE: Public meetings

Dear Ms. Braverman:

I have looked into your request to have the public notice of the Geary II permit republished and must decline your request. The regulations concerning public notice for mining permit applications, at 25 Pa. Code Section 86. 31, require that the paper in which the notice be published be a paper of general circulation in the area, not the most widely read paper. The Tribune Review is a paper of general circulation in the area in question. Therefore, the publication was a proper notification of the application and the Department will not require that notice be republished.

I must also decline to schedule a second informal conference for the application review. We will continue to schedule informal conferences during the traditional workday at facilities that are offered at no cost to the Commonwealth. In order to hold meetings in the evening, I would have to pay my staff overtime and I am allowed to assign overtime to my staff only for emergency situations due to budget limitations. The Bureau of Abandoned Mine Reclamation may have more latitude with regard to assigning overtime to its staff because that program has a different funding source than does the active mining portion of DEP's regulatory program. The state's Abandoned Mine Lands grant cannot be used to support the active mining portions of our program. As to the location of the public meeting, the regulations, at 25 Pa. Code Section 86.34, simply require that the conference be held in the locality of the proposed mining. The regulations do not require that the meeting be held in the same township as the proposed mining activity. My staff tried to get a meeting location closer to the proposed mining site, but the local authorities were requesting a fee of $250.00 for the building. Again because of budgetary constraints, we decided to hold the meeting at a location where the local authorities did not charge us for the use of the building.

Please do not hesitate to contact me if you have additional concerns regarding these issues.

Sincerely,

Michael Terretti

-----Original Message-----
From: Mountain Watershed Association [mailto:mwa@mtwatershed.com]
Sent: Friday, May 11, 2007 4:36 PM
To: Mike Terretti
Cc: McGinty, Kathleen
Subject: Public meetings

[A letter submitted for the record by Vernon Haltom, Co-Director, Coal River Mountain Watch, dated August 6, 2007, follows:]

August 6, 2007

Nancy Locke
House Natural Resources Committee
1324 Longworth House Office Building
Washington, DC 20515

SMCRA Comments

Please accept the following comments from Coal River Mountain Watch (CRMW) regarding the 30th anniversary of the Surface Mining Control and Reclamation Act (SMCRA). Our comments primarily deal with public participation in the permitting process and with reclamation.

While SMCRA was passed with good intentions, President Jimmy Carter said he had hoped for a stronger law and he hoped improvements would be made. The intent of the law was to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal." However, 30 years later the effect is unbalanced in favor of the coal industry. Variances that were intended to be rare have become the rule. Variances are so commonplace that they have effectively voided the rules they vary from. Thirty years of weakening have left SMCRA incapable of any but token, nominal environmental protection.

Regarding comments from the coal industry on "redundant overlaps" between SMCRA and the Clean Water Act, CRMW anticipates further efforts by the industry to weaken either or both laws. SMCRA does not void the Clean Water Act and should not give the coal industry special license to pollute. We oppose any change to either Act that will further weaken them or deny citizens' rights to hold regulators and permitting agencies accountable for upholding and enforcing all laws.

Regarding surface mining, West Virginia Department of Environmental Protection Secretary Stephanie Timmermyer said, "the practice is now carefully planned and permitted with extensive scientific, regulatory and public input." CRMW vehemently disagrees with the public input portion of this statement. While SMCRA provisions promote public input, we have found in actual practice that regulators disregard, discount, and dispute public input. We are given very little time to submit comments on thick permits that have been developed and discussed with regulating/permitting agencies sometimes for years. When a permit application is advertised in the newspaper, it has become practically a "done deal." It is then advertised in small print in the newspaper, so citizens are forced to read the paper every day to find out if something affects them. The permit is then only available during DEP and courthouse hours, forcing citizens to take time off work and then travel for an hour or more to examine the permit. Citizens are expected to do this, scour the documents, and provide compelling comments within 30 days. We are then given an "informal conference" where we can state our objections. Outside of litigation, this is our last chance. The DEP then ignores citizens' comments or contemptuously discounts them and grants the permit anyway.

As a result, the people in these affected communities have no faith in the process. Why bother wasting the time to comment if the comments are going to be ignored? In both the permitting and regulating processes, agencies have instilled a climate of hopelessness in communities in coal-producing regions. Time and time again, citizens say, "There's nothing we can do. If there's coal

there, they're going to get it. The DEP doesn't listen to us." These comments were essentially confirmed on August 2 at an informal conference when a DEP representative stated that market conditions drive permit applications.

Ms. Timmermyer also stated, "SMCRA has been effective in preventing and remediating offsite impacts that can occur with coal mining. In West Virginia, water replacement is now the rule rather than the exception. Also, a blasting program insisted upon in SMCRA provides neighbors of mining operations with protections in advance of blasting and avenues for redress in the event of damages." CRMW also takes exception to these comments. Water replacement should not be the rule. Maintaining safe, clean groundwater sources should be the rule. By permitting surface mining, the government has deprived citizens of fresh, clean, free water sources. This is not sustainability. This is the destruction of a vital, valuable resource for the extraction of a polluting resource that can be replaced with renewable energy. When one of the residents nearby complained to the DEP about the loss of her well water, the DEP representative blamed it on the trees.

When citizens call in a complaint, DEP investigators typically do not show up until a day or sometimes weeks later. By that time, the dust has cleared. DEP checks blasting logs to make sure legal quantities are written down, and of course they always are. Here again, the DEP places greater credence in the word of a notoriously violating industry than in the word of citizens whose homes are impacted. In the case of fugitive dust, they say there is nothing they can do. When a citizen complained about a gigantic blast that caused a cloud of dust over his community, with photographic evidence, the DEP told him that photos could be altered, essentially questioning his honesty and that of all the other witnesses. Other citizens who have submitted blasting complaints are sometimes provided with a seismograph on their property, seismographs that never seem to work and whose readings are not available to the citizens. DEP representatives typically tell residents that blasting does not damage their homes. To prove otherwise, citizens must expend the time and money to sue. Few have the time and money, so again the regulators instill a climate of hopelessness. Five miles from blasting sites people complain about the size of the blasts. But, since nothing is done, most people do not bother to call in and complain. Just for reference, the US Geological Survey reported that in 2005 474,000 metric tons of explosives were used in West Virginia, the vast majority of this for mining. To put this in perspective, this is the explosive force of 27 Hiroshima-style atomic bombs. Kentucky detonated the equivalent of 21, and both of these numbers are significantly higher than the year before. So the coal industry is using more and more explosives, causing more and more damage, and citizens' concerns are ignored.

Ms. Timmermyer also said, "The permitting process, in fact, has become a planning tool for companies and communities. The SMCRA requirement to reclaim mined lands and return them to uses equal or better than those which existed before mining has become an important economic development component for West Virginia." Again, CRMW takes great exception to these comments. Communities do not use the process as a planning tool, unless you include planning to close shop and move away. Mined lands are emphatically not returned to equal or better uses. While Ms. Timmermyer listed a handful of commercial developments, a handful is all there is. They are the exception rather than the rule, and these developments typically provide little or no benefit to the communities. Instead, hundreds of thousands of acres of mountains, covered with one of the world's most biologically diverse forests, filled with sustainable, life-giving water, are destroyed. The valuable water resources, the timber resources, and the non-timber resources are forever gone and replaced with a barren plateau of rubble covered with topsoil substitute and non-

native grasses. This is what is typical, not the handful of showcase sites the industry has spent millions on manicuring for years. The "forestland" approved as a post-mining land use amounts to nothing of benefit to the community. The ginseng and other delicate plant resources cannot grow on these sites.

I will not take the time to go into as much detail rebutting the industry's comments; there simply is not enough time. Bill Raney of the West Virginia Coal Association gave the testimony he is paid to give, calling concerned citizens environmental extremists and painting a very rosy but grossly distorted picture of the coal industry's environmental caretaking. Mr. Raney says that miners and companies are threatened today and further says, "We turn to you, as we did in 1977, to protect us and bring peace of mind to the miners and companies in the coalfields." To this we must respond. The Preamble to the Constitution begins with "We the People." The duty of the US Congress is to the People not the corporations. Congress has no obligation to protect an industry to the detriment of the People. Therefore, Coal River Mountain Watch turns to you to protect us and bring peace of mind to the people and communities in the coalfields.

Please also read the enclosed comments from members.

Sincerely,

Vernon Haltom

Vernon Haltom
Co-director

[A letter submitted for the record by Robert L. Johnson, PE, Collinsville, Illinois, dated August 3, 2007, follows:]

August 3, 2007

Open Letter to: Nick J. Rahall II, Chairman
Committee on Natural Resources
Thirty Years of the Surface Mining Control and Reclamation Act (SMCRA)

The federal Office of Surface Mining (OSM) has abdicated its responsibility to enforce Surface Mining Control and Reclamation Act (SMCRA) rules. And OSM's Office of the Solicitor recently stated that OSM does not have the authority to correct errant decisions made by State mining agencies (OSM Solicitor, July 12, 2006).

And State mining agencies are the bastion of people connected to the mine companies. State agencies therefore are biased toward sacrificing private and public land for the production of coal.

And, despite the hoopla over SMCRA provisions for public participation and rights to appeal and sue over agency decisions, those provisions are regrettably nothing but a façade. State mining agencies and the mining companies work closely to limit the presentation and content of Public Hearings and to prevent objective appeals of decisions.

Public appeals are sent before Administrative Hearing Officers that are trained and paid for by the State's mining agency whose decision is being appealed; sort of like a defendant in court paying the judge hearing his case.

On a site-specific basis, the local public has virtually no technical or legal persons to which they can turn. In a practical sense, all those with the technical and legal skills to help them are aligned with the mining industry. The cost of appeals, of tens, if not hundreds of thousands of dollars, are beyond the resources of the public adversely affected by individual mine operations. And whatever resources the public has available to launch effective appeals or lawsuits is countered by coal companies willing to spend ten times whatever the public has.

Hearing Officers facing evidence in appeals that overwhelming favor the public, distract the hearing into a myriad of procedural details to the degree that the issue of the appeal is never heard.

Both Hearing Officers and judges routinely defer to the finding of the State's agency decision, the decision that is being challenged. Since OSM has abdicated its responsibility to enforce rules, there is no unbiased, unprejudiced forum for the public to turn, and the decisions being made State mining agencies become almost the force of law.

Reclamation of Monterey Mine No. 2, Germantown, Illinois
Monterey Mine 2, owned and operated by ExxonMobil, was designed in the 1980's. Its water supply was from the Pearl Sand Aquifer located about ten feet below the mine's coal waste landfill, the Refuse Disposal Areas. There is no liner beneath this landfill containing 30million cubic yards of coal waste. A hydrologic study showed that coal wastes would not leach into the Aquifer.

Immediately upon commencing mining operations, the groundwater was found to be contaminated with leaching coal waste. "Monitoring, investigation, and management of groundwater at the No. 2 Mine have been integrated with the mine operations since 1980." (Groundwater Management Plan, Monterey Coal Company, May 8, 2002.).

The mine closed in 1996 (several months before the original miners were to achieve their 20year pension). Due to the groundwater contamination, a new Reclamation Plan was necessary. The State mining agency brought in the Illinois Environmental Protection Agency (IEPA) to oversee a Groundwater Management Plan. That Plan consisted of placing a impermeable cap over the coal waste landfill. The mine objected, wanting to save $10,000,000 by putting a permeable cover over the waste, allowing the coal contaminants to continue to leach into Aquifer. For reasons still unknown, IEPA agreed.

Both nearby residents and farmers have complained for years that their water supply from the Aquifer was being contaminated and threatened with contamination by mine operations. Some residents have had to connect to a newly installed water supply system, partially paid for by the mine. These residents now must pay for water, where once they had their own. Other residents still rely upon the Aquifer being contaminated by the mine. Farmers and ranchers continue to use the threatened and actually contaminated Aquifer.

The Reclamation Plan, which incorporates the Groundwater Management Plan, is based on the premise that extraction wells restrict coal waste contamination to within the permit boundary. The Groundwater Management Plan, prepared by the mine's engineers states that there is no off-site groundwater data on which to the base the Plans. IEPA once collected 17 off-site groundwater samples. The Plan refers to this data: "It is noted that the IEPA did not provide the location of these sampling points; therefore, only limited interpretation of this data was possible by Monterey." Recently, the location of the 17 wells sampled by IEPA was provided to the public. The natural groundwater flow at the site is southwest; only 1 of the 17 wells monitored by IEPA was southwest of the mine.

The entire Reclamation Plan is premised on there being no off-site groundwater contamination and, therefore, the Plan is entirely based upon a single downgradient water sample whose data cannot be correlated to it. How does this comply with SMCRA rule that requires permits to "*affirmatively demonstrate*" that mining activities "*prevent*" off-site contamination?

According the Groundwater Management Plan/Reclamation Plan, the groundwater contamination at this mine will stabilize in maybe 100years. The groundwater model contained in the Plans shows that the coal waste will continue to threatened off-site groundwater resources for more that 500years. The Plan relies upon the mine to maintain the "monitoring, investigation, and management of groundwater at the No. 2 Mine, integrated with the mine operations since 1980," a system of pumps to treat 500,000gallons a day of contaminated groundwater before it is discharged into the Kaskaskia River, a potable water supply. Both environmental protection rules and SMCRA rules have provisions that prohibit groundwater resources from being threatened by mine activities. Does anyone, including State agencies or OSM, really believe the mine intends to operate and maintain the pumps and treatment of 500,000gallons/day for 500years? Nevertheless, the State approved the Plans.

Furthermore, SMCRA rules require, "Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment." With no impermeable cap over the wastes, water pollution is not minimized by mine operations. With the newly installed slurry wall, the groundwater flow is to the northwest and southeast, the flow having already been thoroughly disrupted by the extraction pumps. And the Plan relies entirely upon a large-scale water treatment system. Nevertheless, the State approved the Plan.

The Public Hearing for the Reclamation Plan lasted 27minutes (transcript available). About fifteen minutes of that time consisted of mine representatives telling local residents what a "good neighbor" the mine was to them. About four minutes of that time was spent explaining the $30,000,000 Plan that would affect the community for the next 500years. And the remaining time was spent with the mine and State mining agency refusing to answer any of the questions posed by the residents. This is the Public Participation envisioned by SMCRA?

Residents appealed the Plan. Mine lawyers delayed the proceeding for months. The State mining agency decided to train a Hearing Officer especially for the occasion. Hearing prep lasted 6months. Unsurprisingly, the Hearing Officer, paid for by the State mining agency, eventually found in favor of the State mining agency. This is the fair and unbiased appeal process envisioned by SMCRA?

Post-mining land use of the site is pastureland but, according to the Reclamation Plan, "this area will not be grazed by livestock or specifically cut and cured for livestock feed." This is because the land *after reclamation* is still not stable enough for safe and economically viable commercial, agricultural, or recreational use. In effect the post-mining land use is designated as "pastureland that cannot be used as pastureland." This is the restoration of mine sites envisioned by SMCRA?

The appeal of the Reclamation Plan is now under federal appeal process and has languished there since September 2006, almost a year now. This is the timely appeal process envisioned by SMCRA?

In the spring of 2006, a local farmer filed a groundwater contamination complaint with IEPA. His well has high concentrations of coal waste parameters. IEPA dismissed the complaint, stating that the coal waste contamination must have come from some other source than the 30million cubic yards of coal waste present immediately upgradient of the farmer's well. IEPA refused to identify what other possible source there might be.

IEPA then collected off-site groundwater samples just beyond the mine permit boundary. The wells had high concentrations of coal waste parameters. Additional wells were installed and another sampling event conducted. The well samples had high concentrations of coal waste parameters. In December 2006, the mine was directed to prepare an off-site investigation program and provide a solution to the problem. The public through the Freedom of Information Act recently requested that information.

In 2004, the mine installed a permanent 3mile pipeline to continue its discharge of diluted contaminated groundwater into the River. Because the "monitoring, investigation, and management of groundwater at the No. 2 Mine, integrated with the mine operations since

1980, the pipeline was a continuing mining operation and the attendant permit boundary revision, needed to implement the pipeline operations, required, under SMCRA, a Public Hearing. The State mining agency so stated in letter to residents in August 2005. The Public Comment period ended August 31, 2005. By November 2005, no Public Hearing had been scheduled.

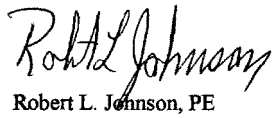
When residents inquired when the Public Hearing would be held, the State mining agency replied that the lawyers for the mine had sent a letter "indicating that a public hearing was not required" under SMCRA. The State mining agency sent the mine lawyers' letter to OSM who sent it to the Office of the Solicitor for review. According to OSM, the "Office of the Solicitor effectively advised that the operation of the refuse area, including construction and operation of the pipeline, is an on-going aspect of the overall surface coal mining operation, and is subject to the requirements of SMCRA section 522(e)," thus a Public Hearing was required. Furthermore, the Solicitor stated that it had reviewed the mine lawyers' arguments and found those arguments, "unpersuasive."

Nevertheless, in December 2006, after 16months during which nothing about the pipeline had changed, the State mining agency unilaterally changed its decision and decided it would not conduct a Public Hearing. The final decision has no mention of its August 2005 decision or of the findings of the federal Solicitor.

Under SMCRA, once a mine site is reclaimed typically in 3-5years, active reclamation ceases and the land is available for economic redevelopment. But at this mine, the operators characterized the operation and maintenance of extraction pumps ultimately discharging 500,000gallons/day into the Kaskaskia River watershed, a system that has been already operating for 30years and must continue for centuries, as being "incidental to reclamation activity." So has a 3-5year reclamation of the mine site under SMCRA been somehow warped to mean, as characterized by the Solicitor, "coal mining operations" lasting 100-500+ years?

In January 2007, the public appealed the State mining agency's final decision. Despite scores of documents that provided a preponderance of evidence that the pipeline was a continuing mining operation, the Hearing Officer, trained and paid by the State mining agency and whose principle legal expertise is employment law, recently found in favor of the State mining agency. In his decision, the Hearing Officer effectively denied the public's right to a formal hearing on the matter.

All this is the much-exalted right under SMCRA for public participation and appeal? Many provisions of SMCRA need to be updated, but perhaps more importantly, current provisions needed to be fully and properly implemented and enforced.



Robert L. Johnson, PE
8 Cypress Point
Collinsville, Illinois 62234
618/530-6604
JohnsonConsultingPE@juno.com

[A letter and attachments submitted for the record by Clarence Loucks, Hillsboro, Illinois, follow:]

BY FAX 11 PAGES 7-30-07
(202) 225-1931 URGENT

---

145 Suits Lane
Hillsboro, IL 62049

Mr. Jim Zoia, Staff Director
U.S. House Committee on Natural Resources
1324 Longworth House Office Bldg.
Wash. D.C. 20515

Dear Sir:

Thank you for the opportunity to comment on the Surface Mining Control and Reclamation Act("SMCRA"). Some of the provisions of the Act are of urgent and critical importance to hundreds of property and homeowners in Montgomery County, IL., as we are facing the prospect of longwall coal mining in the very near future. Specifically, the destructive effect of the planned and intentional surface subsidence upon homes, is of great concern.

Illinois law, the Surface Coal Mining Land Conservation and Reclamation Act (225 ILCS 720) is based upon SMCRA. The following is quoted from the IL law, Article VII, Sec. 7.01 (c), which appears on page 29 of my copy. (cover page, and pp.28-29 attached) (See also pg. 4 of USCA/D.C., #02-5136, copy attached)

> "No person shall cause or allow any surface mining operations or any surface impact of underground mining operations within 300 horizontal feet from any occupied dwelling, unless waived by the owner thereof, nor within 300 horizontal feet of any public building, school, church, community, or institutional building, public park, or within 100 horizontal feet of a cemetery."

The preceeding paragraph would seem to protect homes from longwall subsidence, by any reasonable interpretation. In fact, that apparently was the interpretation used for several years by informed persons, including a Federal District Court Judge. (See attached pages 2 and 8 of USCA/DC #02-5136) Unfortunately, 02-5136 reversed the District Court. (See attached page 14) You will also see in the attached copy of 3-28-05 letter from the Illinois Dept. of Natural Resources, that "surface impact of underground mining" does not apply to longwall subsidence, in their opinion.

At this time, we urgently need to amend SMCRA, in language that is clear and direct, and which is not subject to the interpretion used in 02-5136, in order to protect our homes from the ravages of intentional subsidence.

The requirement and promise of repairing damage after subsidence is not sufficient. When families are forced to vacate their homes for six months or more while subsidence is caused and repairs are attempted, it can cause life threatening stress and trauma for some, especially the elderly or debilitated. And the truth is, it is virtually impossible to put things back to their original state, particularly those things related to trying to stabilize the damaged and repaired foundations which are resting on disturbed soil. Settling and further damage can occur for many years into the future.

fax-1

For brevity, I have mentioned only a few of my very serious concerns about longwall mining. Long term damage to prime farmland is another. When carefully studied, the realization of longwall subsidence shocks most people. The response is something like "How can they get away with that? We're supposed to be constitutionally secure in our homes and property." Additional protection is definitely needed. SMCRA amendments would seem to be a good, expedient route.

Thank you for your assistance.

Sincerely,

Clarence A. Loucks

(217) 532-9335

cc: Rep. Phil Hare, Carlinville, IL. Office, by mail

Encl: Cy IL law cover page and PP. 28-29
Cy U.S. Court of Appeals/D.C. No. 02-5136 cover and Pgs. 2, 4, 8, 14.
Cy 3-28-05 letter from IL DNR

SURFACE COAL MINING LAND CONSERVATION AND RECLAMATION ACT (225 ILCS 720/)

ARTICLE I: GENERAL PROVISIONS

225 ILCS 720/1.01 (from Ch. 96 1/2, par. 7901.01)

Sec. 1.01. Short Title. This Act may be cited as the Surface Coal Mining Land Conservation and Reclamation Act.

(Source: P.A. 86-1475.)

225 ILCS 720/1.02 (from Ch. 96 1/2, par. 7901.02)

Sec. 1.02. Legislative Declaration. (a) It is declared to be the policy of this State to provide for conservation and reclamation of lands affected by surface and underground coal mining in order to restore them to optimum future productive use and to provide for their return to productive use including but not limited to: the planting of forests; the seeding of grasses and legumes for grazing purposes; the planting of crops for harvest; the enhancement of wildlife and aquatic resources; the establishment of recreational, residential and industrial sites; the establishment of new bodies of water for recreational, agricultural, and wildlife conservation purposes; and for the conservation, development, management, and appropriate use of all the natural resources of such areas for compatible multiple purposes, to aid in maintaining or improving the tax base; and protecting the health, safety and general welfare of the people, the natural beauty and aesthetic values, and enhancement of the environment in the affected areas of the State; to prevent erosion, stream pollution, water, air and land pollution and other injurious effects to persons, property, wildlife and natural resources; to assure that the coal supply essential to the Nation's and State's energy requirements, and to their economic well-being is provided; to strike a balance between protection of the environment and agricultural productivity, and the Nation's need for coal as a source of energy; and to assure that land conservation and reclamation plans for all mining operations are available for the prior consideration of the public, and of county governments within whose jurisdiction such lands will be affected by coal mining.

(b) It is the purpose of this Act to implement these policies through methods and standards that fully comply with the requirements established by the United States Congress in the Surface Mining Control and Reclamation Act of 1977.

(c) It is also the purpose of this Act to establish requirements that are no more stringent than those required to meet the Federal Surface Mining Control and Reclamation Act of 1977 (PL 95-87).

(Source: P.A. 81-1015.)

(225 ILCS 720/1.03) (from Ch. 96 1/2, par. 7901.03)

Sec. 1.03. Definitions. (a) Whenever used or referred to in this Act, unless a different meaning clearly appears from the context:

(1) "Affected land" means:

(A) in the context of surface mining operations, the areas described in Section 1.03(a)(24)(B), and

(B) in the context of underground mining operations, surface areas on which such operations occur or where such activities disturb the natural land surface.

(2) After revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan, an additional amount of the bond or deposit may be released. When determining the amount of bond or deposit to be released after successful revegetation has been established, the Department shall retain that amount of bond or deposit for the revegetated area which would be sufficient for a third party to pay the cost of reestablishing revegetation and for the period specified for operator responsibility. No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by this Act or until soil productivity for prime farmlands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices.

(3) When the operator has successfully completed all mining and reclamation activities, the remaining portion of the bond may be released, but not before the expiration of the period specified for operator responsibility.

(4) No bond shall be fully released until all reclamation requirements of the permit and this Act are fully met.

(e) The Department shall notify the permittee in writing of its decision to release or not to release all or part of the performance bond or deposit (1) within 60 days after the filing of the request, if no public hearing is held under subsection (c) of this Section, or (2) if a public hearing has been held under subsection (c) of this Section, within 30 days thereafter.

(f) If the Department disapproves the application for release of the bond or deposit or portion thereof, the Department shall state in writing the reasons for disapproval and shall recommend corrective actions necessary to secure said release. An opportunity for a public hearing shall be provided.

(g) If the Department approves the application, it shall notify the municipality and county in which the mining operation is located by certified mail at least 30 days prior to the release of all or a portion of the bond or deposit.

(h) The Department may by rule provide procedures for the administration of this Section, including procedures for hearings and informal conferences.

(i) Surface coal mining operations on lands eligible for remining shall not affect the eligibility of those lands for reclamation and restoration under the Abandoned Mined Lands and Water Reclamation Act after the release of the bond or deposit for any such operation under this Section.

(Source: P.A. 90-490, eff. 8-17-97.)

ARTICLE VII: PROHIBITION OF CERTAIN MINING

(225 ILCS 720/7.01) (from Ch. 96 1/2, par. 7907.01)

Sec. 7.01. Prohibited Mining. (a) No person shall cause or allow any mining operations which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved by both the Department, in accordance with procedures of Article III of this Act, and the Federal, State, or local agency with jurisdiction over the park or the historic site.

(b) No person shall cause or allow any surface mining operations or any surface impact of underground mining operations within 100 horizontal feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line. The

Department may permit such roads to be relocated, or the area affected to lie within 100 horizontal feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected.

(c) No person shall cause or allow any surface mining operations or any surface impact of underground mining operations within 300 horizontal feet from any occupied dwelling, unless waived by the owner thereof, nor within 300 horizontal feet of any public building, school, church, community, or institutional building, public park, or within 100 horizontal feet of a cemetery.

(d) No person shall cause or allow any mining operations on any land included within an area designated unsuitable for mining operations under this Article.

(e) The prohibitions of this Section do not apply to mining operations which existed on August 3, 1977.

(Source: P.A. 81-1015.)

(225 ILCS 720/7.02) (from Ch. 96 1/2, par. 7907.02)

Sec. 7.02. Criteria for Designating Lands Unsuitable for Mining Operations. (a) An area shall be designated as unsuitable for all or certain types of mining operations if the Department determines that reclamation in accordance with the requirements of this Act is not technologically and economically feasible.

(b) An area may be designated unsuitable for all or certain types of mining operations if such operations would:

(1) be incompatible with existing state or local land use plans; or

(2) affect fragile or historic lands on which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or

(3) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products; or

(4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(c) Designation of any area as unsuitable for all or certain types of mining operations does not of itself prohibit mineral exploration of such area. Exploration on lands designated unsuitable for mining must be approved by the Department to ensure that exploration does not interfere with any value for which the area has been designated unsuitable for mining operations. The Department shall by rule prescribe procedures for such determinations.

(d) The Department shall adopt rules which define terms used in this Section, which establish criteria for the designation of lands under this Section to accomplish the purposes of this Act, and which provide for determinations under this Section to be integrated as closely as possible with present and future governmental land use planning and regulation processes.

(e) The requirements of this Section, and of Sections 7.03 and 7.04, do not apply to lands on which mining operations were being conducted on August 3, 1977, or under a permit issued pursuant to this Act, or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

(Source: P.A. 81-1015.)

(225 ILCS 720/7.03) (from Ch. 96 1/2, par. 7907.03)

Sec. 7.03. Procedure for designation. (a) Any person having an interest which is or may be adversely affected shall have the right to petition the Department to have an area designated as unsuitable for all or certain types of mining operations, or to have such a designation terminated.

Ex-5

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 7, 2003 Decided June 3, 2003

No. 02-5136

CITIZENS COAL COUNCIL, ET AL.,
APPELLEES/CROSS-APPELLANTS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, AND
NATIONAL MINING ASSOCIATION,
APPELLANT/CROSS-APPELLEES

Consolidated with
02-5137, 02-5190, 02-5232, 02-5244, 02-5245

Appeals from the United States District Court
for the District of Columbia
(No. 00cv00274)

Kathryn E. Kovacs, Attorney, U.S. Department of Justice, argued the cause for federal appellant/cross-appellee Secre-

---

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Pet-6

tary of the Interior. With her on the briefs were *William B. Lazarus* and *Robert H. Oakley*, Attorneys.

Thomas C. Means argued the cause for appellant/cross-appellee National Mining Association. With him on the briefs were *J. Michael Klise*, *Kirsten L. Nathanson*, and *Harold P. Quinn, Jr.*

Walton D. Morris, Jr., argued the cause for appellees/cross-appellants. With him on the briefs were *Paul W. Edmondson*, *Elizabeth S. Merritt*, *Howard I. Fox*, and *Glenn P. Sugameli*.

Gregory E. Conrad and *Christopher B. Power* were on the brief for *amicus curiae* Interstate Mining Compact Commission in support of the Secretary of the Interior and the National Mining Association. *Henry M. Ingram* entered an appearance.

Before: SENTELLE and ROGERS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge:* This is an appeal by the Secretary of the Interior and intervenor National Mining Association ("NMA") from a judgment of the District Court. The District Court held that the Secretary's interpretation of the Surface Mining Control and Reclamation Act's ("SMCRA") section 701(28), 30 U.S.C. § 1291(28) (2000), to exclude subsidence from the definition of "surface coal mining operations" regulated under section 522(e) of the Act, 30 U.S.C. § 1272(e), was contrary to the law and therefore invalid. Because we find that Congress did not speak unambiguously on this precise issue in the SMCRA and because we find the Secretary's interpretation to be reasonable, we defer to the Secretary and reverse the District Court.

I. Background

A. The Litigation

This case began with Citizens Coal Council's ("CCC") challenge to the Secretary of the Interior's final rulemaking

quent vacation of the regulation, and CCC appeals the District Court's refusal to grant the full relief it requested.

B. The Statutory Scheme

We recognize from the outset that the SMCRA is a complex and often puzzling statute, in many cases raising a variety of questions as to its correct interpretation. SMCRA was enacted in an effort by Congress to both "protect society and the environment from the adverse effects of surface coal mining operations" and to "assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural activity and the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(a), (f). As the District Court recognized and the parties do not dispute, the focus of the regulation in SMCRA was primarily on the surface mining techniques, such as strip-mining, and one of its goals was to encourage the development and application of underground mining technologies as an alternative less likely to disturb lands used for other activities. *See Citizens Coal*, 193 F. Supp. 2d at 161 (citing 30 U.S.C. §§ 1201, 1202(k)).

To this purpose, SMCRA section 522(e) prohibits "surface coal mining operations" with certain exceptions, in a number of protected areas, particularly within the boundaries of the national parks system, national forests, and public parks and historic sites. In addition, these operations are also prohibited "within [100] feet of the outside right-of-way line of any public road"; "within [300] feet from any occupied dwelling, unless waived by the owner thereof"; and "within [300] feet of any public building, school, church, community, or institutional building, public park, or within [100] feet of a cemetery." 30 U.S.C. § 1272(e)(4), (5).

SMCRA section 701(28) defines "surface coal mining operations" as follows:

> (A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the re-

tions," this interpretation might be more clearly compelled. However, as CCC points out, the phrase which follows: "surface operations and surface impacts incident to an underground coal mine" could add significantly to the scope of the term "operations" as used in this context.

As the District Court noted, the Secretary essentially parses the definition to read "activities conducted on the surface of lands in connection with [1] a surface coal mine or [2] subject to the requirements of section 1266 of this title[,] surface operations and surface impacts incident to an underground coal mine...". *Citizens Coal*, 193 F. Supp. 2d at 163 (citing 30 U.S.C. § 1291(28)(A)). The Secretary supports this interpretation with the definition's next sentence which begins with the phrase "[s]uch activities." This phrase is repeated throughout the remainder of the definition, and is defined within the provision by the examples of activities listed, *e.g.*, excavation; physical or chemical processing; and loading for interstate transport. *See* 30 U.S.C. § 1291(28)(A). The Secretary therefore concludes that the opening sentence refers to these "activities" only. The District Court held that this reading was not "the most natural" one, in light of the legislative history and the overall purpose of the Act. *See Citizens Coal*, 193 F. Supp. 2d at 163–64. The reading advanced as the "most natural" by CCC and accepted by the District Court "becomes apparent with the addition of three commas" as follows: " 'surface coal mining operations' means—(A) activities conducted on the surface of lands in connection with a surface coal mine[,] or [,] subject to the requirements of section 1266 of this title [,] surface operations and surface impacts incident to an underground coal mine...." *Id.* at 163. The District Court and CCC therefore read 701(28) to mean the surface coal mining operations—prohibited in areas specified by 522(e)—to include as a separate matter "surface impacts" incident to an underground mine, which must then include subsidence.

We need not disavow the District Court's determination that CCC's tendered interpretation is the more natural one in order to reverse the District Court and uphold the Secretary. As noted by the District Court we have, on a previous

30 U.S.C. § 1272(e) (no surface coal mining operations ... shall be permitted—(1) on any lands within the boundaries of units of the National Park System ... (2) on any Federal lands within the boundaries of any national forest ... (3) which will adversely affect any publicly owned park ... (4) within 100 feet of the outside right-of-way line of any public road ... (5) within 300 feet from any occupied dwelling....). Thus, the "permit" argument based on section 516(d) has no compelling force on the interpretation of section 522(e).

III. Conclusion

For the reasons explained above, we find that the definition of "surface coal mining operations" in SMCRA section 701(28) is ambiguous as to whether Congress intended it to include subsidence, and therefore, whether subsidence is among the prohibitions contained in section 522(e) is likewise ambiguous. We conclude that the Secretary's interpretation, albeit perhaps not the "most natural" reading, is a reasonable one, and therefore we defer to that interpretation in accordance with the requirements of *Chevron*. We reverse the decision of the District Court and uphold the validity of the regulation.

Illinois Department of
Natural Resources
One Natural Resources Way • Springfield, Illinois 62702-1271
http://dnr.state.il.us

Rod R. Blagojevich, Governor
Joel Brunsvold, Director

March 28, 2005

Clarence Loucks
145 Suits Lane
Hillsboro, Illinois 62049

Dear Mr. Loucks:

Thank you for your participation in the public meeting held in Hillsboro on February 24, 2005 and your visit to our office on March 23, 2005. We understand that the potential for a mine opening in your vicinity raises many concerns about potential impacts to the area. We trust that our participation in the meeting helped to address some of the issues that have been raised.

In response to your question concerning application of Section 7.01(c) of the state Act (225 ILCS 720) to subsidence we offer the following.

The Land Reclamation Division of the Office of Mines and Minerals is the regulatory authority for coal mine reclamation in Illinois as designated by the federal Office of Surface Mining. Our program must be as effective as the federal program but by Illinois statute, cannot be more stringent than the federal program. The Office of Surface Mining has determined that the prohibitions of 522(e) of SMCRA (the federal law) - which correspond to Section 7.01 of the state Act - do not apply to subsidence due to underground mining. This interpretation was challenged in court and the U.S. DC Circuit Court of Appeals has ruled that this interpretation is valid. As you requested a copy of that decision is enclosed.

Similarly, while Section 7.01(c) of the state Act states that "surface mining operations or any surface impacts of underground mining" shall not be allowed within 300 feet of an occupied dwelling, "surface impact to underground mining" are considered to be impacts from those activities conducted on the surface by an underground mine, and not impacts from subsidence. There are other sections of the state Act which deal specifically with subsidence.

We appreciate your interest in this matter and trust the above information addresses your concerns.

Sincerely,

Scott K. Fowler, Supervisor
Land Reclamation Division

SKF:DF:vb
Enclosure — USCA/D.C. # 02-5136 6/3/03
cc: D. Barkley
D. Pflederer

fax-11 (and)

Printed on recycled and recyclable paper

03241431.wpd

[A letter submitted for the record by David Webb, Naoma, West Virginia, dated August 4, 2007, follows:]

Nancy Locke
House Natural Resources Committee
1324 Longworth House Office Building
Washington, D.C. 20515

Ref. SMCRA August 4, 2007

Please accept my comments in reference to the July 25, 2007 SMCRA hearings held by Chairman Rahall.

My name is David Webb. I live in the Coal River Valley of Southern West Virginia. I've read the text of the July 25th. SMCRA hearings and I am appalled by the untruths and lies by some of those that testified. WV DEP Secretary Stephanie Timmermeyer said in her testimony that reclamation of mountain top removal strip mining sites was going great here in WV. Nothing could be further from the truth. Where are her statistics to back that up? Less than 5% of these strip sites have any type of reclamation at all, and none of them have been reclaimed to approximate original contour as required by SMCRA. Bill Raney, president of the WV Coal Association testified that the coal industry performs quality reclamation. All one needs to do to confirm this lie is to fly over the Coal River Valley and see the truth for themselves. The mining industry is not reclaiming these strip sites per SMCRA requirements. To uncover the lie about providing good jobs, simply look at the Coal Association's own web site to see that in 1980 there were over 55,000 coal mining jobs in WV. Today there are less than 15,000. He also said there was "overlapping redundancy" between SMCRA and the Clean Water Act and asked Chairman Rahall to work on legislation that would prevent future lawsuits against the industry. Chairman Rahall agreed with Mr. Raney and said he was right on target. Well, if Mr. Rahall and Mr. Raney lived where I lived they would much better understand what "right on target" truly means. Our communities are being bombed to the tune of over 3 million pounds of explosives a day from mountain top removal operations. We are the target! We have people who have had their drinking wells poisoned by mining waste and other mining contaminates, their homes foundation cracked, their homes flooded, and we are all breathing heavy amounts of blasting dust, coal dust, coal scrubbing chemicals, and diesel fuel. Our elementary school is surrounded by a massive coal operation including a coal silo within 300 feet of the school in clear violation of SMCRA, and they are trying to add yet another silo within 300 feet of that buffer zone. . SMCRA also makes it very clear that mining operations cannot exist within 100 feet of a stream. The WV DEP allows variances to that rule and the mining companies are not only mining within the 100 foot buffer zone, they are mining through the stream. Our people's homes have been flooded and washed away because of valley fills and illegal sediment ponds. People have also drowned from this flooding. When it rains, we get nervous and stay up at night watching the streams and hollows for a sudden high rush of water coming down from these sediment ponds and valley fills. We are being forced to leave our home place.

We have sick children, many of them with asthma. We have high rates of cancer. We are being murdered. I know no other way to say it. This is genocide and it's being conducted by the coal industry aided by the government agencies and elected officials they have captured and control. SMCRA does not overlap the clean water protection act. SMCRA has not been enforced. Before anyone can determine if SMCRA needs any changes or clarifications, it first must be enforced. Only after a period of real enforcement can it be properly analyzed. Revisiting SMCRA now after 30 years of no enforcement is a scam and smacks in the face those that worked to address the citizen's needs and the congress that passed the legislation, and the President that signed the legislation.
I want it added to the record that I am a decorated veteran of the Viet Nam War. I volunteered to sacrifice my life for the country I love. I call upon Congressmen Rahall to not introduce any changes to SMCRA that would make our survival here in the Coal River Valley any more difficult than it already is. I call upon Congressman Rahall to consider We The People before he considers coal company profits. His first duty is to protect the citizens. We are being terrorized by the criminal activity of the coal industry and their lobbyist. I call upon Chairman Rahall and Congress to get tough with the mining enforcement agencies and direct them to enforce SMCRA to the letter of the law. I call upon the U.S. Congress and Homeland Security to rid our communities of the terrorist practices and criminal activity of the coal mining industry. I call upon the Congress of the United States of America to abolish mountain top removal forever.

Respectfully,

David Webb

PO Box 274
Naoma, WV 25140

[Comments dated August 1, 2007, submitted for the record by Ronald E. Yarbrough, Ph.D., PG, Professor Emeritus, Earth Sciences, Southern Illinois University, follow:]

1 August 2007

COMMENTS TO THE U.S. HOUSE NATURAL RESOURCES COMMITTEE
THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
A 30th ANNIVERSARY REVIEW

I wish to thank the Natural Resources Committee for a review of a 30 year old act-SMCRA and the chance to pass on to our elected leaders a personal view of the coal industry and regulators, which I have worked for and have worked against in legal proceedings and publications. I am now 69 and am Professor Emeritus, Earth Sciences, Southern IL University, Edwardsville. I am also retired from the U.S. Army Corps of Engineers, St. Louis District where I worked part and full time for 17 years. I also worked for the former U.S. Bureau of Mines, Twin-Cities Lab, researching subsidence. My consulting work, over the last 40 years has been focused on coal mine subsidence and environmental problem solving.

The following items are most important to me and are why SMCRA needs to be updated to follow the changes and mistakes made by the coal industry. The writer has been confronted with some of these problems in my consulting career.

1). The underground coal industry has moved from room and pillar mining (50%+-extraction to protect the surface estate) to longwall mining (80% extraction with controlled subsidence, usually about 80% of seam height). An 84 in. seam would yield about 5.5 feet of subsidence. To legally subside the surface estate the company needs a "right to subside" contract with the surface owner. This relationship of mineral estate and surface estate owners was established in English Common Law in the 1500s. In IL, some of the counties sold old coal mining rights to new companies and also sold the subsidence rights with NO input from the surface estate owner. This type of contract sale must be stopped. CALM (Citizens Against Longwall Mining--they are not against room and pillar mining) in Montgomery County, IL--largely farmers--are presently seeking a declaratory judgment in Federal Court against the coal companies for assuming that they have subsidence rights without a contract with the surface estate owner As one can ascertain, the rich coal companies can wear out the pocketbooks of the farmers in court and their prime farmland will be destroyed by longwall mining, which will be an economic disaster to the farmers, the local economy and America. Congress must not allow the "energy frenzy" to overcome our agricultural economy.

2). Subsidence over room and pillar mines is a rare occurrence and about a million acres of IL is undermined. Seventy-three percent of IL is underlain by coal deposits. It has been estimated that about fifty percent of the coal is recoverable, assuming economics and technology under present day conditions. Most of the surface mineable coal is mined out and underground mining will be the primary method of extraction and the companies wish to have higher extraction--longwall mining, thus, more profit. Occasional subsidence does occur over room and pillar mining, but if in a field, the sags can be easily repaired. If a structure is damaged, PA, IL, KY, OH and IN have a Mine Subsidence Insurance Fund which will repair the home or barn. A major problem today

with the coal companies is that they are denying that the round ponds (sags) in the middle of fields are due to subsidence. The State regulators are sometimes helpful, but, since some feel that they work for the coal companies-not the people, they like to brush off investigations and the farmer has to sue to get compensation. The Office of Surface Mining (OSM) was very helpful with three cases I have worked on in KY.

3). IL also has some of the most productive farmland in the world. Much of the glaciated areas of the State are only 0 to 4% slopes or flat. The farmers who broke the prairie in the 1800s found out that the level areas did not have good drainage. They installed field tile (there is enough field tile in IL to reach to the moon and back) and dug ditches to improve their crop yields. There are millions of dollars invested in the drainage systems in the State. Then, along comes longwall mining. The method involves 100% extraction in a panel that may be 3 miles long and 1000+- feet wide that creates a "bathtub" effect on the surface because room and pillar areas, which function as air and material passageways, parallel the panel and on the ends of the panel there are "room and pillar mains" which do not subside to the same extent as the panel. The Surface Mining Act states: "affected land shall be restored to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood". This has been achieved in a surface mine, for which the law was written, but is impossible with a longwall panel. In the Mt. Vernon Hill Country in Southern IL there have been many successful longwall panels because the land is rolling with slopes between 5 to 15%. Good floodplain land has been undermined and this level land is now largely elongated lakes. But subjacent to our level prime farmland the "bathtubs" on the landscape cannot be restored to a condition capable of supporting the yields of the fields prior to mining. Longwall Mining should be banned under prime farm land that has zero to four percent slopes because it cannot be reclaimed to its original production*.
**NOTE-The Dept. of Agriculture measures slope in their modern SOIL SURVEYS OF THE COUNTIES IN U.S.A.*

4). Rural families usually depend upon groundwater for their water supply for home and animals. The IL. State Geological Survey has conducted studies concerning the effect of longwall mining and bedrock aquifers. They have shown that there is draining of the bedrock aquifer for a year of so but the aquifer normally will recover. Those farmers or rural residents, who depend on shallow wells, usually in glacial derived sandy materials, sometime loose their water supplies for many years. The coal companies who conduct longwall mining in areas of 5%+ slopes and shallow aquifers should conduct studies to determine the effect on aquifers and in both shallow and deep aquifers should be ready to supply resident's adequate water without a law suit. The new SMCRA should make it very clear that the companies have that responsibility.

5). An example of a mining company in IL and longwall mining and landuse-- There have been many complaints by the public about the regulatory agencies, OSM and State Departments that enforce SMCRA, are not doing their jobs. The professional people that I have worked with for many years in both agencies are doing their jobs to enforce the 1977 law--the problem is the law is not written to consider longwall mining and the

agencies must have a law which has teeth to stop the coal companies from deliberately changing the surface landscape. A good example is a permit which was issued in 2006 by the IL Dept. of Natural Resources. A permit was issued to Steelhead Development Co. LLC, which changed its name to Williamson Development Co., LLC who is affiliated with Cline Resource and Development, LLC whose main offices are in Canada and are largely owned by German and Japanese Companies who are also affiliated with Natural Resource Partners, LP, NRP of Houston--owners unknown. The permit was for 540 acres of land, which they purchased, with 434.25 acres of farm land. The reclamation plan calls for the "bathtub lands" to be converted to wildlife habitat with no cropland, 19.26 acres of water and forest land.

So short term taxes versus long term loss to the county. By the way, Williamson Co. does not need any more wildlife land. The writer is also very suspicious of all of the chain of limited liability corporations, some foreign, who will be like some of the old strip mining companies, who were put out of business by the 1977 law. For some companies the old way to operate strip mines was rape, ruin and run and I am concerned that is what the foreign longwall companies (with local offices) are planning to do. The USA will be treated like a third world country supplying raw materials. The writer is not an attorney--who would a landowner or the states or Federal Government sue in the LLC chain?

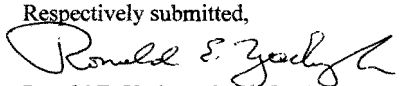
6). Disposal of coal waste is a major problem in all coal fields. On the level surfaces of the Midwest slurry (fine material carried to the waste pile by pipeline) and gob (which is transported by truck) contain many hazardous materials. The Bevill amendment to the Clean Water and Clean Air Acts states that coal cannot be considered a hazardous material. Coal waste contains most heavy metals, materials that change into dangerous gases and high amounts of sulfur compounds which are released into the neighborhood around the waste piles. There is an excellent example in Clinton Co., on level prime farmland, of two waste piles that are 40 to 60 feet high and contain about 30+ million tons of waste. The piles were built on top of an unusual large shallow aquifer and Monterey Coal Co. (owned by Exxon-Mobile) knowingly poisoned the aquifer. Neither IEPA nor IDNR had laws that allowed them to modify the construction methods of the company. Now, the mine is closed and they operate pumps to remove the poison, direct the poison into settlement basins and place it a pipe line to the Kaskaskia River, a source of drinking water. The noxious materials will not be leached out of the pile for 500+ years. The company was allowed to place only 2 feet of dirt on top rather than the required 4 feet--why? no one knows, yet the regulators let them get away with it. Unless poor little Exxon could not afford to follow the reclamation law. Who will clean up this mess in the future--the taxpayers of IL and America? The writer recommends that hearings should be held so the decision makers can design a new SMCRA that will be similar to the law for sanitary landfills to stop the pollution from coal waste.

7). Management of a revised SMCRA--recommended changes. As the writer stated, the profession people, who do the work, are limited by the current law to protect the property of the people in their state. One of the major problems is the fact that "the fox is watching

the chicken house". The $0.15 tax on underground mined coal and the $0.35 tax on surface mined coal go to the regulators, OSM and the respective state regulatory agencies. The more coal is mined the more dollars the politically appointed managers have to spend. Of course, these managers tell the professionals what to do, they are the boss. It is the writer's opinion, that Congress should review this fact and write into the new law a means to modify this management system and replace it with an independent group that answers to Congress and the people-not to the paying coal companies. Also, the other environmental portions of the present law are not strong enough. Congress has the National Environmental Policy Act which works very well because it MANDATES planning, scoping and public input. Getting a public hearing on a mining permit is like getting a tooth pulled, the agencies are very reluctant to face an angry public. As a geologist and former regulator, I feel sorry for them as all they have to work with is the 1977 law in which underground mining and waste disposal was not emphasized.

The writer would be very willing to work with a congressional aide as the House moves forward with the modification of the Surface Mining Act.

Respectively submitted,



Ronald E. Yarbrough, Ph.D., PG
ryarbrough02@charter.net

○